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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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CAUSE NO. PD-0203-19

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COURT OF CRIMINAL APPEALS
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IN THE COURT

OF CRIMINAL APPEALS

AUSTIN, TEXAS

MATTHEW JOSEPH ALLEN
PETITIONER

v.

THE STATE OF TEXAS
RESPONDENT

PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Petitioner, Matthew Joseph Allen, Defendant in Cause No. 380-80447-2016 out of the 366th Judicial District Court, Collin County, Texas and Appellant before the Court of Appeals for the Fifth District at Dallas, Texas, in Cause No. 05-17-00226-CR, respectfully presents to this Honorable Court his Petition for Discretionary Review.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner does believe oral argument will aid this Court in the disposition of these cases.

NAMES OF PARTIES

Pursuant to Tex. R. App. P. Rule 68.4, the following is a complete list of the parties and persons interested in the outcome of this cause:

(A) **THE HONORABLE RAY WHELESS**; 366th Judicial District Court of Collin County, Texas; Presiding Judge at Jury Trial; Collin County Courthouse, 2100 Bloomdale Road, Third Floor, McKinney, Texas 75071;

(B) **MATTHEW JOSEPH ALLEN**, the Appellant;

(C) **MARC J. FRATTER**, Counsel for Appellant on Appeal; the Law Office of Marc J. Fratter, 1207 West University Drive, Suite 101, McKinney, Texas 75069;

(D) **PAUL STUCKLE**, Counsel for Appellant at Trial; the Law Office of Paul Gregory Stuckle; 1001 20th Street, Plano, Texas 75074;

(E) **THE STATE OF TEXAS**, by and through **GREG R. WILLIS**, Collin County District Attorney, and **PETER GANYARD AND SHANNON MILLER**, Assistant Criminal District Attorneys and Counsels for Appellee at Trial (Crimes Against Children Unit), and **JOHN R. ROLATER**, Assistant Criminal District Attorney

(Chief of Appellate Section) and **ANDREA L. WESTERFELD**, Assistant Criminal District Attorney (Appellate Section); Collin County District Attorney, 2100 Bloomdale Road, Suite 100, McKinney, Texas 75071.

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REASON FOR REVIEW.....19-25

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STATEMENT OF THE CASE[1]

Appellant was arrested on September 22, 2015 for the offense of Continuous Sexual Abuse of a Young Child under Fourteen (14) Years of Age. (CR: 7, 16-18) On February 16, 2016 the Grand Jury of Collin County, Texas returned a true-bill of indictment against Appellant. (CR: 7-8, 19-21) The nine-count indictment alleged in part that on or about October 1, 2009 through August 15, 2012 Appellant committed the offense of Continuous Sexual Abuse of a Young Child under Fourteen (14) Years of Age (Count I) against A.H. (hereinafter referred to as "AH"), on or about October 1, 2009 Appellant committed the offense of Indecency with a Child by Exposure (Count II) against AH, on or about September 25, 2009 Appellant committed the offense of Aggravated Sexual Assault of a Child (Count III) against AH, on or about September 25, 2009 Appellant committed the offense of Aggravated Sexual Assault of a Child (Count IV)

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[1] **Index of Abbreviations: CR- Clerk's Record in Cause No. 380-80447-2016; RR1- Volume 1 of Reporter's Record of Jury Trial proceedings commencing 2/13/2017 (Master Index); RR2- Volume 2 of Reporter's Record of Jury Trial proceedings commencing 2/13/2017 (*Voir Dire)*; RR3- Volume 3 of Reporter's Record of Jury Trial proceedings commencing 2/14/2017; RR4- Volume 4 of Reporter's Record of Jury Trial proceedings commencing 2/15/2016; RR5- Volume 5 of Reporter's Record of Jury Trial proceedings commencing 2/16/2017; RR6- Volume 6 of Reporter's Record of Jury Trial proceedings commencing 2/17/2017; RR7- Volume 7 of Reporter's Record of Jury Trial proceedings commencing 2/13/2017-2/17/2017 (Exhibits: State's 1-3, 5, 7-8; Defendant's 1-4)**

against AH, on or about September 25, 2009 Appellant committed the offense of Aggravated Sexual Assault of a Child (Count V) against AH, on or about September 25, 2009 Appellant committed the offense of Indecency with a Child by Sexual Contact (Counts VI) against AH, on or about September 25, 2009 Appellant committed the offense of Indecency with a Child by Sexual Contact (Count VII) against AH, on or about December 1, 2012 Appellant committed the offense of Sexual Assault of a Child (Count VIII) against AH, and on or about December 1, 2012 Appellant committed the offense of Sexual Assault of a Child (Count IX) against AH. (CR: 7, 19-21; RR2: 6-12; RR3: 7-11)

After entering pleas of "Not-Guilty" in Cause No. 380-80447-2016 to the offenses of Continuous Sexual Abuse of a Young Child under Fourteen (14) Years of Age in Count I of the Indictment, Indecency with a Child by Exposure in Count II of the Indictment, Aggravated Sexual Assault of a Child in Counts III, IV and V of the Indictment, Indecency with a Child by Sexual Contact in Counts VI and VII of the Indictment and Sexual Assault of a Child in Counts VIII and IX of the Indictment, the Jury found Appellant "Guilty" as to Counts I, II and VI of the Indictment. (CR: 7, 12-14, 231-246, 262-270; RR2: 6-12; RR3: 7-11; RR5: 83-85) And, following the

punishment phase of the trial the Jury assessed punishment in Count I as a term of thirty-five (35) years in the Institutional Division of the Texas Department of Criminal Justice, Count II as a term of five (5) years in the Institutional Division of the Texas Department of Criminal Justice and Count VI as a term of fifteen (15) years in the Institutional Division of the Texas Department of Criminal Justice, sentences to run concurrently. (CR: 7, 12-14, 252-270; RR6: 80-83) On March 1, 2017 Appellant timely filed a *Pro* Se Motion for New Trial and Notice of Appeal in Cause Number 380-80447-2016. (CR: 280-282) On or about March 3, 2017 the Collin County Indigent Defense Office appointed Marc J. Fratter as Counsel for Appellant on Appeal. (CR: 284-285) Finally, Counsel for Appellant on Appeal timely filed a First Amended Notice of Appeal in Cause Number 380-80447-2016. (CR: 286-287)

STATEMENT OF THE PROCEDURAL HISTORY

This case is on appeal from the 366th Judicial District Court of Collin County, Texas. The case below was styled the *State of Texas vs. Matthew Joseph Allen* and numbered 380-80447-2016. Appellant was convicted of Continuous Sexual Abuse of a Child under Fourteen (14) YOA, Indecency with a Child by Exposure and Indecency with a Child by Sexual Contact.

Appellant was assessed a sentence of thirty-five (35) years, five (5) years and fifteen (15) years in the Institutional Division of the Texas Department of Criminal Justice on February 17, 2017, sentences to run concurrently. Notice of appeal was given on March 3, 2017 and the amended notice of appeal was given on March 6, 2017. The clerk's record was filed on June 6, 2017; the reporter's record was filed on August 8, 2017. The Appellant's Brief was filed on January 5, 2017 and the State of Texas filed its Reply Brief on January 27, 2017. The 5th Court of Appeals set the case for submission on the briefs on February 28, 2018 and then on July 17, 2018, the Court of Appeals, 5th Judicial District of Texas at Dallas REVERSED and AFFIRMED IN PART Appellant's conviction. *See MATTHEW JOSEPH ALLEN v. State of Texas*; Cause No. 05-17-00226-CR. *(Exhibit "A")* Both the Appellant and State filed *Motions for Rehearing.*[2] On August 16, 2018 Appellant filed a Reply to the State's *Motion for Rehearing.* On November 20, 2018, the Court of Appeals, 5th Judicial

[2] *See Exhibit "C".* The State's ***Motion for Rehearing*** also recognized that the Appellant's double jeopardy rights had been violated. By moving one date of offense to December 2011 and placing that date of offense within the same range for the date of offense for the charge of continuous sexual abuse of a child, these periods now overlapping created the double jeopardy issue. The opinion was withdrawn but replaced with the exact same December 2011 date of offense, essentially re-confirming that a double jeopardy issue had transpired. The Appellate Courts analysis of the State's factual assertions as well as the State's legal conclusions ignored what the State was now reporting in its ***Motion for Rehearing***.

District of Texas withdrew its original memorandum opinion issued on July 17, 2018 and issued a new opinion which MODIFIED AND AFFIRMED IN PART AND REVERSED Appellant's conviction. *(Exhibit "C")* On December 18, 2018, Appellant filed a *Motion for Rehearing* and *Motion for Reconsideration En Banc*. On January 22, 2019, the Court of Appeals, 5th Judicial District of Texas denied Appellant's *Motion for Rehearing* and issued a Judgment *Nunc Pro Tunc*. *(See Exhibit "D")* Finally, on January 24, 2019, the Court of Appeals, 5th Judicial District of Texas denied Appellant's *Motion for Reconsideration En Banc.* On February 27, 2019 the Court of Criminal Appeals granted Appellant's *Motion to Extend Time to File the Petition for Discretionary Review,* extending the deadline until March 27, 2019.

QUESTIONS/GROUNDS FOR FIRST GROUND OF REVIEW

THE PANEL ERRED WHEN IT FAILED TO FIND THE EVIDENCE WAS LEGALLY INSUFFICENT TO SUPPORT THE JURY'S FINDING OF GUILT BEYOND A REASONABLE DOUBT AT TO EACH AND EVERY ELEMENT OF THE OFFENSE OF CONTINUOUS SEXUAL ABUSE OF A CHILD UNDER 14 YOA.

REASON FOR REVIEW

THE COURT OF APPEALS DECISION DEPARTED SO FAR FROM THE ACCEPTED AND USUAL COURTS OF JUDICIAL PROCEEDINGS, AND SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR THE EXERCISE OF THE COURT OF CRIMINAL APPEALS'S POWER OF SUPERVISION.

STANDARD OF REVIEW, AUTHORITIES AND ARGUMENT

The facts relevant to this issue are set out in the Statement of Facts and are incorporated herein.

Standard of Review/Authorities

The Appellate Court reviews the sufficiency of the evidence to establish the elements of a criminal offense under the standard set forth in *Jackson v.* Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Brooks v. State,* 323 S.W.3d 893, 912 (Tex.Crim.App.2010) (plurality op.); *Merritt v. State*, 368 S.W.3d 516, 525 (Tex.Crim.App.2012). Under that standard, we view the evidence in light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19, 99 S.Ct.2781; *see also Adames v. State*, 353 S.W.3d 854,

859-60 (Tex.Crim.App.2011). Circumstantial evidence is as probative as direct evidence in establishing guilt of the actor, and circumstantial evidence alone may be sufficient to establish guilt. *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex.Crim.App.2013) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App.2007)).

The jury is the sole judge of credibility and weight to be attached to the testimony of the witnesses. *See Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *Brooks*, 323 S.W.3d at 899; *Merritt*, 368 S.W.3d at 525. All evidence, whether properly or improperly admitted, will be considered when reviewing the sufficiency of the evidence. *See McDaniel v. Brown,* 558 U.S. 120, (2010)(per curiam); *Lockhart v. Nelson*, 488 U.S. 33, 41-42 (1988); *Jackson*, 443 U.S. at 319. When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict and defer to that determination. *Id*; *see also Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crimn.App.2007) (observing that it is the fact-finder's duty "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts") (quoting *Jackson*, 443 U.S. at 319, 99 S. Ct. 2781). Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of

all incriminating circumstances is sufficient to support the conviction. *Hooper*, 214 S.W.3d at 13.

In order to obtain a conviction, the State was required to prove beyond a reasonable doubt that during a period that was more than thirty or more days in duration, Appellant committed two or more acts of sexual abuse, the actor was seventeen years of age or older and the victim was a child that had not yet turned fourteen years of age who is not the spouse of the actor. *See* Tex. Penal Code Ann. § 21.02(b) (Continuous Sexual Abuse of a Child under 14 YOA) (West 2015); *Baez v. State,* No. 04-14-00374-CR, 2015 WL 5964915, at *1 (Tex.App.—San Antonio Oct. 14, 2015, pet. ref'd). Acts that qualify as "sexual abuse" under the statute include indecency with a child, sexual assault, and aggravated sexual assault. *See* Tex. Penal Code Ann. § 21.02(d); *Baez*, 2015 WL 5964915, at *2; *Mitchell v. State*, 381 S.W.3d 554, 561 (Tex.App.—Eastland 2012, no pet.). The testimony of a child victim, standing alone, is sufficient evidence to support a conviction for continuous sexual abuse of a young child. *See* Tex. Code. Crim. Proc. Ann. art. 38.07 (West Supp. 2015); *Lee* v. *State*, 186 S.W.3d 649, 655 (Tex.App.—Dallas 2006, pet. ref'd)(discussing sexual assault). The statute, however, does not require that the exact dates of the abuse be proven.

Brown v. State, 381 S.W.3d 565, 573-74 (Tex.App.—Eastland 2012, no pet.). Moreover, the location of place where the sexual abuse was committed is not an element of the offense. *See* Tex. Penal Code Ann. § 21.02.

Based on the State's charging instrument, the State must prove each and every one of the following elements beyond a reasonable doubt to secure a conviction against Appellant: (1) MATTHEW JOSEPH ALLEN, HEREINAFTER DEFENDANT, on or about the 1st day of October 2009 through the 15th day of August, 2012 in Collin County, Texas, did then and there; (2) during a period that was 30 days or more in duration, committed two or more acts of sexual abuse against AH, said acts of sexual abuse having been violations of one or more of the following penal laws, including: (3) indecency with a child by contact: intentionally and knowingly, with the intent to arouse or gratify the sexual desire of any person, engage in sexual contact by causing part of the hand of AH, a child younger than seventeen (17) years of age and not the spouse of the defendant, to touch part of the genitals of said defendant; and (4) any one or more of the aforementioned acts of sexual abuse were committed on more than one occasion and, at the time of the commission of each of the acts of

sexual abuse, the defendant was seventeen (17) years of age or older and AH was a child younger than fourteen (14) years of age. Defendant may not be convicted of Continuous Sexual Abuse of a Young Child under 14 YOA for any acts of sexual abuse that occurred after September 16, 2012, when AH was over the age of 14.

Discussion

The State's case for a conviction against Appellant for the offense of Continuous Sexual Abuse of a Young Child under 14 YOA fails for three reasons: (1) the testimony of AH would only support a conviction of Continuous Sexual Abuse of a Young Child under 14 YOA if this Jury Trial had taken place in the State of Iowa rather than the State of Texas. In short, nearly all of the testimony of AH was recounting events that transpired only in the State of Iowa; (2) the testimony of AH never established beyond a reasonable doubt, or by clear and convincing evidence or by even a preponderance of the evidence that the "once or twice" that AH recounts the occurrence of a possible offense occurred during a period that was 30 days or more in duration—meaning, quite frankly, that no testimony by AH ever confirmed these alleged acts of sexual abuse occurred at least even on one occasion in a period of more than thirty (30) days apart. The testimony of

AH supported that if more than one act of sexual abuse did occur it was just as likely it occurred one (1) day apart, as ten (10) days apart, as fifteen (15) days apart; and (3) the testimony of AH never established beyond a reasonable doubt, or by clear and convincing evidence or by even a preponderance of the evidence that Appellant committed two or more acts of sexual abuse against AH , despite even addressing the consideration that the alleged two or more acts of sexual abuse must occur in a period of more than 30 days or more in duration. The testimony of AH revealed a constant theme of "maybe once or twice" with no frame of reference if that once or twice occurred in within a thirty (30) day period or beyond, or if that "once or twice" really even occurred more than just "once or twice", and whether that "once or twice" occurred only in Iowa, only in Texas, the first time occurring in Iowa and then the second time occurring in Texas, or the first time occurring in Texas and then the second time occurring in Iowa.

Because the evidence is legally insufficient to support the jury's finding of guilt beyond a reasonable doubt as to each and every element of the offense of Continuous Sexual Abuse of a Child under Fourteen (14) Years of Age, this Court must reverse the verdict of "Guilty" and render an acquittal in favor of Appellant.

QUESTIONS/GROUNDS FOR SECOND GROUND OF REVIEW

THE PANEL ERRED WHEN IT FAILED TO FIND THE EVIDENCE WAS LEGALLY INSUFFICENT TO SUPPORT THE JURY'S FINDING OF GUILT BEYOND A REASONABLE DOUBT AT TO EACH AND EVERY ELEMENT OF THE OFFENSE OF INDECENCY WITH A CHILD BY SEXUAL CONTACT, ESPECIALLY CONSIDERING THE PANEL UNILATERALLY SUBSTITUTED A DATE OF OFFENSE CONTRADICTORY TO THE INDICTMENT AND THE COURT'S CHARGE WHICH CREATED DOUBLE JEOPARDY ISSUES.

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The jury is the sole judge of credibility and weight to be attached to the testimony of the witnesses. *See Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *Brooks*, 323 S.W.3d at 899; *Merritt*, 368 S.W.3d at 525. All evidence, whether properly or improperly admitted, will be considered when

reviewing the sufficiency of the evidence. *See McDaniel v. Brown,* 558 U.S. 120, (2010)(per curiam); *Lockhart v. Nelson*, 488 U.S. 33, 41-42 (1988); *Jackson*, 443 U.S. at 319. When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict and defer to that determination. *Id*; *see also Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crimn.App.2007) (observing that it is the fact-finder's duty "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts") (quoting *Jackson*, 443 U.S. at 319, 99 S. Ct. 2781). Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all incriminating circumstances is sufficient to support the conviction. *Hooper*, 214 S.W.3d at 13.

Tex. Penal Code Ann. §21.11(a)(1) (Indecency with a Child by Sexual Contact) states: (a) A person commits an offense if, with a child younger than seventeen years of age, whether the child is of the same of opposite sex, the person: (1) engages in sexual contact with the child or causes the child to engage in sexual contact; (c) In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person: (1) any touching by a person, including touching

through clothing, of the anus, breast, or any part of the genitals of the child; or (2) any touching of any part of the body of the child, including touching through clothing, with the anus, breast, or any part of the genitals of the person.

Based on the State's charging instrument, the State must prove each and every one of the following elements beyond a reasonable doubt to secure a conviction against Appellant: (1) MATTHEW JOSEPH ALLEN, HEREINAFTER DEFENDANT, on or about the 25th day of September, 2009, in Collin County, Texas, did then and there; (2) intentionally and knowingly, with the intent to arouse or gratify the sexual desire of any person, engage in sexual contact by causing part of the hand of AH, a child younger than seventeen (17) years of age and not the spouse of the defendant, to touch part of the genitals of said defendant.

A Defendant charged with continuous sexual abuse of a child who is also tried in the same criminal action for an enumerated offense based on conduct committed against the same victim may not be convicted of both offenses unless the latter offense occurred outside the period of time in which the continuous sexual abuse of a child was committed. *See also Price v. State*, 434 S.W.3d 601, 606 (Tex.Crim.App.2014)(citing Tex. Penal Code

§21.02(e)). Once the Appellate Court designated the date of offense of Count VI of the Indictment as December 2011, it moved what was originally a date of offense of (9/25/2009) preceding Count I- Continuous Sexual Abuse of a Child, alleged to have taken place (10/1/2009 through 8/15/2012) and placed it within the same period of time in which the Continuous Sexual Abuse of a Child was alleged to have taken place. *Allen v. State*, No. 05-17-00226-CR, slip op. 4-5 (Tex.App.—Dallas, July 17, 2018). Therefore, the fact finder would only be able to find Appellant guilty of either the continuous sexual abuse of a child, or, alternatively, indecency with a child by sexual contact, but not both. *See id.*

Discussion

Immediately preceding Counts III, IV, V, VI and VII of the Indictment is the following allegation: "**and it is further presented in and to said court that the said defendant on or about the 25th day of September, 2009, in Collin County, Texas, did then and there...**" (CR: 19-21; RR7: Defendant's Exhibit #7) Please recall that immediately following the State's case-in-chief, the Trial Court granted Counsel for Appellant's request for directed verdict—based on the State's failure to prove beyond a reasonable doubt that the offenses occurred in the State of

Texas, let alone Collin County, Texas, on Counts III, IV, V, VII, VIII and IX of the Indictment. (CR: 19-21; RR5: 6-15; RR7: Defendant's Exhibit #2, State's Exhibit # 7) Since the Trial Court found that Counts III, IV, V, and VII, all of which shared the same on or about date of September 25, 2009, did not occur in Collin County, Texas or even in the State of Texas, by reasonable inference Count VI, which also shared the exact same on or about date of September 25, 2009, should have shared the same fate as Counts III, IV, V and VII. If Appellant was absent from Collin County and/or the State of Texas on September 25, 2009 for Counts III, IV, V and VII, Appellant certainly could not have been committing Count VI in Collin County and/or the State of Texas on September 25, 2009 and, therefore, must have been absent from Collin County and/or the State of Texas on September 25, 2009 for Count VI as well. Logic would require that the Court grant a directed verdict on each and every count sharing the date of offense of on or about September 25, 2009, which ought to have included Counts III, IV, V, VI and VII of the Indictment. (CR: 19-21; RR5: 6-15; RR7: Defendant's Exhibit #2)

Appellant also asserts that double jeopardy prohibits Appellant from being convicted of Indecency with a Child by Sexual Contact and

Continuous Sexual Abuse of a Child when the exact same offense of Indecency with a Child by Sexual Contact is considered to be one of the acts of "sexual abuse" as defined by and resulting in the conviction of the continuous sexual abuse of a child statute and simultaneously but independently resulting in the conviction of indecency with a child by sexual contact.

Because the evidence is legally insufficient to support the jury's finding of guilt beyond a reasonable doubt as to each and every element of the offense of Indecency with a Child by Sexual Contact, this Court must reverse the verdict of "Guilty" and render an acquittal in favor of Appellant.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellant prays this court reverse Appellant's conviction and render an acquittal as to Counts I and VI or, alternatively, reverse Appellant's convictions and grant Appellant a new trial.

Respectfully Submitted,

/s/ Marc J. Fratter
Law Office of Marc J. Fratter
Marc J. Fratter
Bar No. 24029973
1207 West University Drive, Ste. 101
McKinney, Texas 75069
Tel. (214) 471-3434
Fax (972) 692-5600
mfratter@yahoo.com

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2019 a true copy of the foregoing ***Petition for Discretionary Review*** has been served on the District Attorney of Collin County by electronic delivery and on the State of Texas, Prosecuting Attorney, Stacey Soule, at 209 West 14th Street, P.O. Box 13046, Capitol Station, Austin, Texas 78711, by United States certified priority mail, return receipt requested.

/s/ Marc J. Fratter
Marc J. Fratter

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 9.4(i)(3) and 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure the undersigned counsel certifies that the total word count of the Appellant's *Petition for Discretionary Review* filed in the above-referenced cause according to the Microsoft Word program is 4,498.

/s/ Marc J. Fratter
Marc J. Fratter

AFFIRM and REVERSE; and Opinion Filed July 17, 2018.

Exhibit "A"

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00226-CR

MATTHEW JOSEPH ALLEN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 366th Judicial District Court of
Collin County, Texas
Trial Court Cause No 380-80447-2016

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Boatright

A jury convicted appellant of the offenses of continuous sexual abuse of a child under the age of fourteen, indecency with a child by sexual contact, and indecency with a child by exposure. The jury sentenced appellant to prison for thirty-five years for the continuous sexual abuse, five years for indecency by contact, and fifteen years for indecency by exposure. He argues that the evidence is legally insufficient to support his convictions. We affirm the trial court's judgment on appellant's convictions for continuous sexual abuse and indecency by sexual contact. We reverse the trial court's judgment on his conviction for indecency by exposure.

Continuous Sexual Abuse of a Child under 14

In his first issue, appellant contends that the evidence was legally insufficient to support his conviction for continuous sexual abuse of a child under fourteen. To commit that offense, a person over the age of seventeen years would have to engage in two or more acts of sexual abuse

during a period of thirty days or more while the child was under the age of fourteen. TEX. PENAL CODE ANN. § 21.02(b)(1) (West Supp. 2017). Causing a child to touch a person's genitals over the person's clothing constitutes sexual abuse. *Id.* §§ 21.02(c)(2), 21.11 (a)(1), (c)(2). At trial, a child testified that appellant caused the child to touch appellant's genitals over appellant's clothing. The child also testified that this touching occurred when appellant was over seventeen and the child was under fourteen. Appellant argues that the evidence does not establish that he sexually abused the child more than once over a period of thirty days or longer.

At trial, a prosecutor asked the child "how many times or how often" the touching would occur, and the child responded, "like once or twice." When the prosecutor asked, "Once or twice how often?" the child said, "I don't know." From that testimony, it is unclear whether the touching occurred more than once. But the child's later testimony indicates that it did. For example, the child testified that, when the child moved out of state, the touching "would start happening more often." This indicates that the touching happened often—more than once—in Texas, though not as often as it did elsewhere. And when the child was asked at trial whether, during the "times" the touching occurred once a month, the child was living in Texas and under the age of fourteen, the child answered, "Yes." The child consistently responded affirmatively to several other questions that referred to multiple incidents of touching during this period. Thus, the child's testimony supports the inference that the touching occurred more than once.

Appellant also argues that, even if the touching did happen more than once, it was just as likely to have occurred one or ten or fifteen days apart as thirty or more days apart. However, he does not explain how the record might support that inference.

At trial, the prosecutor asked whether the child had previously told anyone that the touching had occurred "about once a month." The child said "Yes." And when the prosecutor asked the child whether the touching occurred once a month in Texas, the child answered "Yes." The child also testified that the touching began in the middle of fourth grade, and the child's mother testified

that the family moved out of state during the summer before the start of fifth grade. This testimony supports the inference that the touching occurred more than once, and that the multiple incidents of sexual abuse were spread over as few as two months and as many as eight or nine months, a period of about sixty days or more.

But the same testimony permits a different inference. The child might have been referring to just two acts of sexual abuse, the first occurring at the beginning of February and the second at the beginning of March—which is usually a period of twenty nine days. It is also possible that the first act of sexual abuse occurred at the end of one month and the second at the beginning of the next—a period of as few as two days. In either of these two scenarios, there would be multiple acts of sexual abuse that occurred over a period of fewer than thirty days. We note, however, that appellant does not argue that the sexual abuse occurred on February 1 or near the beginning or end of any other month. Nor is there any evidence that it did.

Accordingly, the evidence supports the inference that appellant sexually abused the child more than once over a period of thirty days or longer, but the evidence permits the inference that appellant sexually abused the child more than once over a period of fewer than thirty days. When the record supports conflicting inferences, we must presume that the jury resolved the conflicts in favor of the verdict and defer to that determination. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We must review 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 offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The testimony of a child victim, standing alone, is sufficient to support a conviction for continuous sexual abuse of a child. TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2017); *Lee v. State*, 186 S.W.3d 649, 655 (Tex. App.—Dallas 2006, pet. ref'd).

Viewing the evidence in the light most favorable to the verdict, *Jackson*, 443 U.S. at 319, and deferring to the jury's resolution of any conflicting inferences, we conclude there was legally sufficient evidence that appellant sexually abused the child more than once over a period of at least thirty days when appellant was over seventeen and the child was under fourteen. We overrule appellant's first issue.

Indecency with a Child by Exposure

In his second issue, appellant argues that the evidence was legally insufficient to support his conviction for indecency with a child by exposure. A person commits that offense if, with the intent to arouse or gratify the sexual desire of any person, he exposes his genitals knowing that a child under the age of seventeen is present. TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (West Supp. 2017). As appellant notes, there is no evidence in the record that he exposed his genitals to the child. The State concedes that there is no evidence to support appellant's conviction for indecency with a child by exposure. Viewing the evidence in the light most favorable to the verdict, *Jackson*, 443 U.S. at 319, the evidence would not permit any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. We sustain appellant's second issue.

Indecency with a Child by Sexual Contact

In his third issue, appellant contends that the evidence was legally insufficient to support his conviction for indecency with a child by sexual contact. A person commits that offense if, with intent to arouse or gratify a person's sexual desire, he causes a child under seventeen to touch the person's genitals. TEX. PENAL CODE ANN. § 21.11(a)(1). Appellant argues that the State failed to prove that appellant committed that offense on or about the date alleged in the indictment.

Count VI of the indictment alleged that appellant committed the offense of indecency with a child by sexual contact. This count was part of a group of five counts—III through VII—that, the indictment alleged, addressed offenses that occurred "on or about the 25th day of September, 2009, in Collin County, Texas."

Appellant moved for directed verdicts on four of those five counts—III, IV, V, and VII—because, he says, the State failed to prove beyond a reasonable doubt that the offenses occurred in Texas. The trial court granted appellant's motions. Now, he contends that the evidence was legally insufficient to support his conviction of Count VI because "Logic would require that the Court grant a directed verdict on each and every count sharing the date of offense of on or about September 25, 2009, which ought to have included Counts III, IV, V, VI, and VII of the Indictment."

But appellant did not move for a directed verdict on Count VI. And he does not attempt to explain how logic would require that the trial court grant a motion for directed verdict that he never made.

Nor does appellant point to any evidence that the trial court granted his motions on Counts III, IV, V, and VII on the grounds that he was not in Texas on September 25. When appellant's counsel moved for a directed verdict on Count III—the first of the five counts alleged to have occurred on September 25 in Texas—he said there was no evidence that the conduct addressed by that count occurred in Texas. The State then said it would abandon that count. The trial court responded, "All right. The motion is granted. So Count III by State's concession." This is evidence that the trial court granted the motion for directed verdict on that count because the State conceded, not because the trial court found that appellant was in another state on September 25. Nor does the record indicate that the trial court had a different reason for granting directed verdicts on the other three counts. The only evidence regarding the trial court's reason for granting appellant's motions for directed verdicts on Counts III, IV, V, and VII is that the State abandoned those counts.

Thus, there is no reason to conclude that the trial court would have granted a motion for directed verdict on Count VI, had appellant made one. Appellant presents no other argument regarding the sufficiency of the evidence on Count VI. He does not assert in his appellate brief that

he was out of state on or about September 25, 2009. And he does not point us to any place in the record indicating that he might have been.

The State contends that there is sufficient evidence that appellant committed the offense of indecency with a child by sexual contact, as alleged in Count VI of the indictment. However, in support of that contention, the State points to an incident that occurred in 2011 when the child returned to Texas. The State does not explain how this 2011 incident might have occurred "on or about" September 25, 2009.

In determining whether there was legally sufficient evidence that the offense was committed on or about that date, we are guided by long standing precedents of the Court of Criminal Appeals holding that the phrase "on or about" refers to conduct that occurs before indictment and the expiration of the statute of limitations. *See, e.g., Abston v. State*, 253 S.W.2d 41, 42 (Tex. Crim. App. 1952). A more recent opinion of the Court explains when and how we are to apply that definition. In *Mireles v. State*, 901 S.W.2d 460 (Tex. Crim. App. 1995), the Court of Criminal Appeals reviewed a case in which the indictment alleged the offense of indecency with a child by sexual contact "on or about" a certain date. *Id.* The record established multiple indecent contacts with the child, but it did not establish specific dates on which the contacts occurred. *Id.* The trial court's jury charge used the phrase "on or about," but did not define it. *Id.*

The court of appeals in *Mireles* had held that, absent an instruction defining "on or about," the phrase referred to the days surrounding a specific calendar date. *Id.* at 461. The court of appeals had acknowledged that the phrase is a legal term that refers to the limitations period, but decided that a lay jury could not be expected to know the term's legal meaning. *Id.* at 459.

The Court of Criminal Appeals reversed the court of appeals. When the phrase "on or about" in the jury charge is arguably ambiguous, the Court of Criminal Appeals explained, it should be examined as part of the entire context of the trial. *Id.* (citing *Boyde v. California*, 494 U.S. 370 at 380–83 (1990)). The Court faulted the court of appeals for summarily dismissing

evidence that the jury was told during voir dire and final argument, without objection by the defense, that "on or about" referred to the statute of limitations period. *Id.* at 460–61. The Court reasoned that the trial court's jury charge "did not prevent the jury from interpreting the term 'on or about' in a manner consistent with its legal meaning," *id.* at 460, which, the court noted, referred to the statute of limitations period, *id.* at 461. The Court concluded that the phrase referred to limitations rather than to the days surrounding a date. *Id.*

We begin our analysis as the Court of Criminal Appeals did in *Mireles*, by considering whether the jury charge in our case was arguably ambiguous. *Id.* at 460. The trial court's jury charge listed the dates and date ranges of the offenses charged in the indictment. The charge then explained that the "State is not required to prove that the alleged offenses happened between those exact dates, it being sufficient if such time is approximately accurate." The charge did not define the term "approximately accurate." It might have referred to days, weeks, or an even longer period surrounding a particular date. Accordingly, we conclude that the term "on or about" in the jury charge was arguably ambiguous.

Next, we consider the phrase in the context of the entire trial. *Id.* During voir dire, the State told potential jurors that they would be free to find appellant guilty even if his conduct occurred outside the dates listed in the indictment, "as long as we prove that it happened before the case was indicted and there is no statute of limitations. . . ." The defense did not object to this. The State also called the dates in the indictment "just kind of suggestions, basically." During closing argument, the State explained that the dates in the indictment had little to do with what it had to prove and acknowledged that this might be hard for lay jurors to accept. "We don't have to prove a specific date to you. I put those dates in there. If you want to fault me, go right ahead." The State specifically told the jury that the law "allows you to base your verdict, even though it says 2009 in the charge for Count VI - - we know that it is when [the child] came back to Texas, which wasn't necessarily in 2009, but the law allows you the on or about date. . . ." Appellant did not object to

any of this. In fact, appellant never made an argument to the jury regarding the meaning of the phrase "on or about," or how close in time to September 25, 2009, an alleged incident had to be in order for it to be on or about that date.

In this way, the record shows that the jury was told that the dates in the indictment were related to the statute of limitations. They were even told that an offense did not have to occur in the same year as the date alleged in the indictment. The record also shows that jurors were told nothing that would have prevented them from interpreting "on or about" to mean any time within the statute of limitations period. Therefore, the phrase "on or about" in the jury trial referred to limitations. The phrase would permit appellant's conviction if the jury found him guilty of having committed the offense within the statute of limitations period. *Id.*

Accordingly, we will consider whether the record shows that appellant committed the offense of indecency with a child by sexual contact within the limitations period. The child testified that appellant caused the child to touch appellant's genitals over appellant's clothing after the child returned to Texas, in December of the child's seventh grade year. Exhibits entered as evidence at trial show that this was in 2011, while the child was under seventeen years of age. Appellant's conduct, therefore, constituted the offense of indecency with a child by sexual contact. TEX. PENAL CODE ANN. § 21.11(a)(1). There is no statute of limitations for this offense. TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(E) (West Supp. 2017). Consequently, the child's testimony supports the inference that the 2011 incident the State identifies in its appellate brief could have occurred as alleged in Count VI of the indictment.

Viewing the evidence in the light most favorable to the jury's verdict, *Jackson*, 443 U.S. at 319, we conclude that there is legally sufficient evidence that appellant committed the offense of indecency with a child by sexual contact as alleged in Count VI of the indictment. We overrule appellant's third issue.

We note, however, that the trial court's judgment of conviction for indecency with a child by contact states that the date of the offense was October 1, 2009. This Court may modify the trial court's judgment and affirm it as modified. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26 (Tex. Crim. App. 1993). We can correct and reform the judgment of the court below "to make the record speak the truth" when the necessary information is in the record before us. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we modify the trial court's judgment of conviction for indecency with a child by contact to state the date of offense as December 2011.

Conclusion

We affirm the trial court's judgment on appellant's conviction of continuous sexual abuse of a child, and we affirm, as modified, the judgment on his conviction of indecency with a child by sexual contact. We reverse the trial court's judgment on appellant's conviction of indecency with a child by exposure.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MATTHEW JOSEPH ALLEN, Appellant	On Appeal from the 380th Judicial District Court, Collin County, Texas
No. 05-17-00226-CR V.	Trial Court Cause No. 380-80447-2016.
	Opinion delivered by Justice Boatright.
THE STATE OF TEXAS, Appellee	Justices Bridges and Brown participating.

Based on the Court's opinion of this date:

the trial court's judgment on appellant Matthew Joseph Allen's conviction of continuous sexual abuse of a child under the age of fourteen (14) is **AFFIRMED**;

as modified, the trial court's judgment on his conviction of indecency with a child by sexual contact is **AFFIRMED**; and

the trial court's judgment on his conviction of indecency with a child by exposure is **REVERSED,** and the appellant is hereby **ACQUITTED** of that offense.

Judgment entered this 17th day of July, 2018.

Exhibit "B"

MODIFY and AFFIRM; and Opinion Filed November 20, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00226-CR

MATTHEW JOSEPH ALLEN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-80447-2016

MEMORANDUM OPINION ON REHEARING

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Boatright

We deny both parties' motions for rehearing. On the Court's own motion, we withdraw our opinion of July 17, 2018, and we vacate the judgment of that date. This is now the opinion of the Court.

A jury convicted appellant of the offenses of continuous sexual abuse of a child under the age of fourteen, indecency with a child by sexual contact, and indecency with a child by exposure. The jury sentenced appellant to prison for thirty-five years for the continuous sexual abuse, five years for indecency by contact, and ten years for indecency by exposure. He argues that the evidence is legally insufficient to support his convictions. We affirm the trial court's judgment on appellant's convictions for continuous sexual abuse of a child and indecency by sexual contact. We reverse the trial court's judgment on his conviction for indecency by exposure.

Continuous Sexual Abuse of a Child under 14

In his first issue, appellant contends that the evidence was legally insufficient to support his conviction for continuous sexual abuse of a child under fourteen. To commit that offense, a person would have to engage in two or more acts of sexual abuse during a period of thirty days or more. TEX. PENAL CODE ANN. § 21.02(b)(1) (West Supp. 2017). Causing a child to touch a person's genitals over the person's clothing constitutes sexual abuse. *Id.* §§ 21.02(c)(2), 21.11 (a)(1), (c)(2). At trial, a child testified that appellant caused the child to touch appellant's genitals over appellant's clothing. The child also testified that this touching occurred when appellant was over seventeen and the child was under fourteen. Appellant argues that the evidence does not establish that he sexually abused the child more than once over a period of thirty days or longer.

At trial, a prosecutor asked the child "how many times or how often" the touching would occur, and the child responded, "like once or twice." When the prosecutor asked, "Once or twice how often?" the child said, "I don't know." From that testimony, it is unclear whether the touching occurred more than once. But the child's later testimony indicates that it did. For example, the child testified that, when the child moved out of state, the touching "would start happening more often." This indicates that the touching would happen often—more than once—in Texas, though not as often as it would elsewhere. And when the child was asked at trial whether, during the "times" the touching occurred once a month, the child was living in Texas and under the age of fourteen, the child answered, "Yes." The child consistently responded affirmatively to several other questions that referred to multiple incidents of touching during this period. Thus, the child's testimony supports the inference that the touching occurred more than once.

Appellant also argues that, even if the touching did happen more than once, it was just as likely to have occurred one or ten or fifteen days apart as thirty or more days apart. However, he does not explain how the record might support that inference.

At trial, the prosecutor asked whether the child had previously told anyone that the touching had occurred "about once a month." The child said "Yes." And when the prosecutor asked the child whether the touching occurred once a month in Texas, the child answered "Yes." The child also testified that the touching began in the middle of fourth grade, and the child's mother testified that the family moved out of state during the summer before the start of fifth grade. This testimony supports the inference that the touching occurred more than once, and that the multiple incidents of sexual abuse were spread over as few as two months and as many as eight or nine months, a period of about sixty days or more.

But the same testimony permits a different inference. The child might have been referring to just two acts of sexual abuse, the first occurring at the beginning of February and the second at the beginning of March—which is usually a period of twenty nine days. It is also possible that the first act of sexual abuse occurred at the end of one month and the second at the beginning of the next—a period of as few as two days. In either of these two scenarios, there would be multiple acts of sexual abuse that occurred over a period of fewer than thirty days. However, appellant does not argue that the sexual abuse occurred on February 1 or near the beginning or end of any other month. Nor is there any evidence that it did.

Accordingly, the evidence supports the inference that appellant sexually abused the child more than once over a period of thirty days or longer, but the evidence also permits the inference that appellant sexually abused the child more than once over a period of fewer than thirty days. When the record supports conflicting inferences, we must presume that the jury resolved the conflicts in favor of the verdict and defer to that determination. *Jackson v. Virginia*, 443 U.S. 307,

319 (1979). The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We must review 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 offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The testimony of a child victim, standing alone, is sufficient to support a conviction for continuous sexual abuse of a child. TEX. CODE CRIM. PROC. art. 38.07 (West Supp. 2017); *Lee v. State*, 186 S.W.3d 649, 655 (Tex. App.—Dallas 2006, pet. ref'd). The State is not required to prove the exact dates of the period of abuse. *Garner v. State*, 523 S.W.3d 266, 271 (Tex. App.—Dallas 2017, no pet.). In this case, the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the relevant time period began around the middle of the 2008–2009 school year and extended into the summer of 2009, before the family moved to Oklahoma.

However, the State pleaded—and the jury was charged—that appellant committed continuous sexual abuse of a child "on or about" October 1, 2009 through August 15, 2012. In determining whether there was legally sufficient evidence that the offense was committed "on or about" that period, we are guided by long standing precedents of the Court of Criminal Appeals, which have explained that the phrase "on or about" refers to conduct that occurs before indictment and the expiration of the statute of limitations. *See, e.g.*, *Abston v. State*, 253 S.W.2d 41, 42 (Tex. Crim. App. 1952). A more recent opinion of the Court explains when and how we are to apply that definition. In *Mireles v. State*, 901 S.W.2d 460 (Tex. Crim. App. 1995), the Court of Criminal Appeals reviewed a case in which the indictment alleged the offense of indecency with a child by sexual contact "on or about" a certain date. *Id.* The record established multiple indecent contacts with the child, but it did not establish specific dates on which the contacts occurred. *Id.* The trial court's jury charge used the phrase "on or about," but did not define it. *Id.*

The court of appeals in *Mireles* had held that, absent an instruction defining "on or about," the phrase referred to the days surrounding a specific calendar date. *Id.* at 461. The court of appeals had acknowledged that the phrase is a legal term that refers to the limitations period, but it decided that a lay jury could not be expected to know the term's legal meaning. *Id.* at 459.

The Court of Criminal Appeals reversed the court of appeals. When the phrase "on or about" in the jury charge is arguably ambiguous, the Court of Criminal Appeals explained, it should be examined as part of the entire context of the trial. *Id.* (citing *Boyde v. California*, 494 U.S. 370 at 380–83 (1990)). The Court faulted the court of appeals for summarily dismissing evidence that the jury was told during voir dire and final argument, without objection by the defense, that "on or about" referred to the statute of limitations period. *Id.* at 460–61. The Court reasoned that the trial court's jury charge "did not prevent the jury from interpreting the term 'on or about' in a manner consistent with its legal meaning," *id.* at 460, which, the court noted, referred to the statute of limitations period, *id.* at 461. The Court concluded that the phrase referred to limitations rather than to the days surrounding a date. *Id.*

We begin our analysis as the Court of Criminal Appeals did in *Mireles*, by considering whether the jury charge in our case was arguably ambiguous. *Id.* at 460. The trial court's jury charge listed the dates and date ranges of the offenses charged in the indictment. The charge then explained that the "State is not required to prove that the alleged offenses happened between those exact dates, it being sufficient if such time is approximately accurate." The charge did not define the term "approximately accurate." It might have referred to days, weeks, or an even longer period surrounding a particular date. Accordingly, we conclude that the term "on or about" in the jury charge was arguably ambiguous.

Next, we consider the phrase in the context of the entire trial. *Id.* During voir dire, the State told potential jurors that they would be free to find appellant guilty even if his conduct occurred

outside the dates listed in the indictment, "as long as we prove that it happened before the case was indicted and there is no statute of limitations. . . ." The defense did not object to this. The State also called the dates in the indictment "just kind of suggestions, basically." During closing argument, the State explained that the dates in the indictment had little to do with what it had to prove and acknowledged that this might be hard for lay jurors to accept. "We don't have to prove a specific date to you. I put those dates in there. If you want to fault me, go right ahead." Appellant did not object to these arguments. In fact, appellant never made an argument to the jury regarding the meaning of the phrase "on or about." Nor did he argue how close in time to the time period pleaded—from October 1, 2009 through August 15, 2012—the multiple offenses had to occur in order for them to be committed "on or about" that period of time.

The record shows that the jury was told that the dates in the indictment were related to the statute of limitations. The record also shows that jurors were told nothing that would have prevented them from interpreting "on or about" to mean any time within the statute of limitations period. Therefore, the phrase "on or about" in the jury trial referred to limitations. The phrase would permit a conviction if the jury found appellant guilty of having committed the offense within the statute of limitations period. *Id.* There is no statute of limitations for the offense of continuous sexual abuse of a young child. TEX. CODE CRIM. PROC. art. 12.01(1)(D) (West Supp. 2017). Accordingly, the evidence supports the inference that this offense could have occurred as alleged in the indictment and the jury charge.

Viewing the evidence in the light most favorable to the verdict, *Jackson*, 443 U.S. at 319, and deferring to the jury's resolution of any conflicting inferences, we conclude there was legally sufficient evidence that appellant sexually abused the child more than once over a period of at least thirty days when appellant was over seventeen and the child was under fourteen. We overrule appellant's first issue.

Indecency with a Child by Exposure

In his second issue, appellant argues that the evidence was legally insufficient to support his conviction for indecency with a child by exposure. A person commits that offense if, with the intent to arouse or gratify the sexual desire of any person, he exposes his genitals knowing that a child under the age of seventeen is present. TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (West Supp. 2017). As appellant notes, there is no evidence in the record that he exposed his genitals to the child. The State concedes that there is no evidence to support appellant's conviction for indecency with a child by exposure. Viewing the evidence in the light most favorable to the verdict, *Jackson*, 443 U.S. at 319, the evidence would not permit any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. We sustain appellant's second issue.

Indecency with a Child by Sexual Contact

In his third issue, appellant contends that the evidence was legally insufficient to support his conviction for indecency with a child by sexual contact. A person commits that offense if, with intent to arouse or gratify a person's sexual desire, he causes a child under seventeen to touch the person's genitals. TEX. PENAL CODE ANN. § 21.11(a)(1). Appellant argues that the State failed to prove that appellant committed that offense on or about the date alleged in the indictment.

Count VI of the indictment alleged that appellant committed the offense of indecency with a child by sexual contact. This count was part of a group of five counts—III through VII—that, the indictment alleged, addressed offenses that occurred "on or about the 25th day of September, 2009, in Collin County, Texas."

Appellant moved for directed verdicts on four of those five counts—III, IV, V, and VII—because, he says, the State failed to prove beyond a reasonable doubt that the offenses occurred in Texas. The trial court granted appellant's motions. Now, he contends that the evidence was legally

insufficient to support his conviction of Count VI because "Logic would require that the Court grant a directed verdict on each and every count sharing the date of offense of on or about September 25, 2009, which ought to have included Counts III, IV, V, VI, and VII of the Indictment."

But appellant did not move for a directed verdict on Count VI. And he does not attempt to explain how logic would require that the trial court grant a motion for directed verdict that he never made.

Nor does appellant point to any evidence that the trial court granted his motions on Counts III, IV, V, and VII on the grounds that he was not in Texas on September 25. When appellant's counsel moved for a directed verdict on Count III—the first of the five counts alleged to have occurred on September 25 in Texas—he said there was no evidence that the conduct addressed by that count occurred in Texas. The State then said it would abandon that count. The trial court responded, "All right. The motion is granted. So Count III by State's concession." This is evidence that the trial court granted the motion for directed verdict on that count because the State conceded, not because the trial court found that appellant was in another state on September 25. Nor does the record indicate that the trial court had a different reason for granting directed verdicts on the other three counts. The only evidence regarding the trial court's reason for granting appellant's motions for directed verdicts on Counts III, IV, V, and VII is that the State abandoned those counts.

Thus, there is no reason to conclude that the trial court would have granted a motion for directed verdict on Count VI, had appellant made one. Appellant presents no other argument regarding the sufficiency of the evidence on Count VI. He does not assert in his appellate brief that he was out of state on or about September 25, 2009. And he does not point us to any place in the record indicating that he might have been.

The State contends that there is sufficient evidence that appellant committed the offense of indecency with a child by sexual contact, as alleged in Count VI of the indictment. However, in support of that contention, the State points to evidence of an incident that occurred in 2011, after the child returned to Texas. Again, we must address whether the 2011 offense as it was proved at trial could have occurred as it was pleaded, "on or about" September 25, 2009. We have concluded that the term "on or about" in the jury charge was arguably ambiguous, and we have identified places in the record where the jury was told that the phrase relates to the issue of limitations. In addition to those instances, when addressing the offense set forth in Count 6 of the indictment, the State specifically told the jury that the law "allows you to base your verdict, even though it says 2009 in the charge for Count VI - - we know that it is when [the child] came back to Texas, which wasn't necessarily in 2009, but the law allows you the on or about date. . . ." Appellant did not object to this argument or make any argument of his own in regard to the role of the charged date for this offense. We conclude, as we did above, that the phrase "on or about" would permit a conviction for this offense if the jury found appellant guilty of having committed it within the statute of limitations period. *Mireles*, 901 S.W.2d at 461.

We review the evidence in the light most favorable to the verdict. *Jackson*, 443 U.S. at 319. The child testified that appellant caused the child to touch appellant's genitals over appellant's clothing after the child returned to Texas, in December of the child's seventh grade year. Exhibits entered as evidence at trial show that this was in 2011, while the child was under seventeen years of age. Appellant's conduct constitutes the offense of indecency with a child by sexual contact. TEX. PENAL CODE ANN. § 21.11(a)(1). There is no statute of limitations for this offense. TEX. CODE CRIM. PROC. art. 12.01(1)(E) (West Supp. 2017). Consequently, the child's testimony supports the inference that the 2011 incident the State identifies in its appellate brief could have occurred as alleged in Count VI of the indictment.

We stress, in the interest of clarity, that this 2011 offense of indecency with a child by contact occurred well outside the statutory period during which appellant committed continuous sexual abuse of a child, i.e., between the middle of the 2008–2009 school year and the summer of 2009. "[A] defendant may be convicted of both continuous sexual abuse of a child and an independent offense listed as a predicate offense in section 21.02(c) against the same child as long as they did not occur within the same time frame." *Aguilar v. State*, 547 S.W.3d 254, 262 (Tex. App.—San Antonio 2017, no pet.). Consequently, our affirming appellant's conviction for the indecency offense does not raise a double jeopardy concern.

Viewing the evidence in the light most favorable to the jury's verdict, *Jackson*, 443 U.S. at 319, we conclude that there is legally sufficient evidence that appellant committed the offense of indecency with a child by sexual contact as alleged in Count VI of the indictment. We overrule appellant's third issue.

We note, however, that the trial court's judgment of conviction for indecency with a child by contact states that the date of the offense was October 1, 2009. This Court may modify the trial court's judgment and affirm it as modified. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26 (Tex. Crim. App. 1993). We can correct and reform the judgment of the court below "to make the record speak the truth" when the necessary information is in the record before us. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we modify the trial court's judgment of conviction for indecency with a child by contact to state the date of offense as December 2011.

Conclusion

We affirm the trial court's judgment on appellant's conviction of continuous sexual abuse of a child, and we affirm, as modified, the judgment on his conviction of indecency with a child by sexual contact. We reverse the trial court's judgment on appellant's conviction of indecency with a child by exposure.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MATTHEW JOSEPH ALLEN, Appellant	On Appeal from the 380th Judicial District Court, Collin County, Texas
No. 05-17-00226-CR V.	Trial Court Cause No. 380-80447-2016.
	Opinion delivered by Justice Boatright.
THE STATE OF TEXAS, Appellee	Justices Bridges and Brown participating.

Based on the Court's opinion of this date, we **MODIFY** the trial court's judgment of conviction for indecency with a child by contact to state the date of offense as December 2011.

We **AFFIRM** the trial court's judgment as **MODIFIED**.

Judgment entered this 20th day of November, 2018.

Exhibit "C"

ACCEPTED
05-17-00226-CR
FIFTH COURT OF APPEALS
DALLAS, TEXAS
8/14/2018 4:33 PM
LISA MATZ
CLERK

In the
Court of Appeals for the
Fifth District of Texas at Dallas

Matthew Joseph Allen Appellant	§	
v.	§	**No. 05-17-00226-CR**
The State of Texas, Appellee	§	

STATE'S MOTION FOR REHEARING

The State respectfully requests a rehearing in this case. After this Court's opinion, the State reviewed the facts of this case and has determined that Appellant's rights against double jeopardy were violated when he was convicted of indecency by contact under Count 6 of the indictment and continuous sexual assault of a child under Count 1 of the indictment. The indecency by contact was shown to have occurred within the period of time in which the continuous acts of sexual abuse were alleged to have occurred in the indictment.

The indictment and jury charge in this case alleged that Appellant committed continuous sexual abuse of a child (Count 1) on or about October 1, 2009 through August 15, 2012. CR 19, 231. Count 6 was alleged to have occurred on or about September 25, 2009. CR 20-21, 231. At trial and on appeal, the State relied on the fact that Appellant forced the victim to touch his penis after the family moved back to Texas in December 2011 to support his conviction for indecency by contact

under Count 6 of the indictment. 5 RR 71; *Allen v. State*, No. 05-17-00226-CR, slip op. at 4-5 (Tex. App—Dallas July 17, 2018). Indeed, this Court relied on that same evidence in holding that the evidence was sufficient to support his conviction for indecency by contact under Count 6 and even modified the judgment to reflect that the offense date for Count 6 was December 2011. *Allen*, slip op. at 4-5. This date is, however, within the period of time in which the continuous sexual abuse was alleged to have taken place. CR 19, 231.

The statute clearly reflects that the Legislature intended to disallow dual convictions for the offense of continuous sexual abuse and for the offenses enumerated as "acts of sexual abuse" when based on the conduct against the same child during the same period of time. *See Price v. State*, 434 S.W.3d 601, 606 (Tex. Crim. App. 2014) (citing Tex. Penal Code §21.02(e)). A defendant charged with continuous sexual abuse who is tried in the same criminal action for an enumerated offense based on conduct committed against the same victim may not be convicted for both offenses unless the latter offense occurred outside the period of time in which the continuous sexual abuse offense was committed. *Id.* Excepting the situation where different periods of time are at issue, a fact finder could find a defendant guilty either of continuous sexual abuse, or, alternatively, an enumerated act of acts of sexual abuse. *See id.*

Because the evidence in this case showed that Appellant committed indecency by contact, which is an enumerated offense, within the time period that the continuous sexual abuse was alleged to have occurred, Appellant's rights against double jeopardy were violated when he was convicted of both offenses.

In this case, the proper remedy is to affirm the conviction for continuous sexual abuse—the most serious offense—and vacate the conviction for indecency by contact. *See Bigon v. State*, 252 S.W.3d 360, 372 (Tex. Crim. App. 2008).

PRAYER

The State prays that the judgment for continuous sexual abuse (Count 1) be affirmed, and that the indecency by exposure case (Count 2) and the indecency by contact case (Count 6) be reversed and that Appellant be acquitted of those offenses.

Respectfully submitted,

Greg Willis
Criminal District Attorney
Collin County, Texas

John R. Rolater, Jr.
Asst. Criminal District Attorney
Chief of the Appellate Division

/s/ Amy Sue Melo Murphy
Amy Sue Melo Murphy
Asst. Criminal District Attorney
2100 Bloomdale Rd., Suite 200
McKinney, TX 75071
State Bar No. 24041545
(972) 548-4331
FAX (214) 491-4860
asmurphy@co.collin.tx.us

Certificate of Service

The State has e-served counsel for Appellant, Marc Fratter, through the eFileTexas.gov filing system and sent a courtesy copy via email to mfratter@yahoo.com, the 14th day of August 2018.

/s/ Amy Sue Melo Murphy
Amy Sue Melo Murphy
Assistant Criminal District Attorney

Certificate of Compliance

This motion complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this motion, the undersigned attorney certifies that this motion contains 550 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

/s/Amy Sue Melo Murphy
Amy Sue Melo Murphy
Assistant Criminal District Attorney

EXHIBIT "D"

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT NUNC PRO TUNC

MATTHEW JOSEPH ALLEN, Appellant

No. 05-17-00226-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District Court, Collin County, Texas
Trial Court Cause No. 380-80447-2016.
Opinion delivered by Justice Boatright.
Justices Bridges and Brown participating.

Based on the Court's opinion of this date:

the trial court's judgment on appellant Matthew Joseph Allen's conviction of continuous sexual abuse of a child under the age of fourteen (14) is **AFFIRMED**;

as modified to state the date of offense as December 2011, the trial court's judgment on his conviction of indecency with a child by sexual contact is **AFFIRMED**; and

the trial court's judgment on his conviction of indecency with a child by exposure is **REVERSED,** and the appellant is hereby **ACQUITTED** of that offense.

Judgment entered this 22nd day of January, 2019.