In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00263-CR

DENNIS MARTIN BEYER, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 6th District Court
Lamar County, Texas
Trial Court No. 28247

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

A Lamar County jury found Dennis Martin Beyer, Jr., guilty of continuous sexual abuse of a young child and imposed a sentence of ninety-nine years' imprisonment. The jury also found Beyer guilty of sexual assault of a child and imposed a sentence of twenty years' imprisonment and a $10,000.00 fine. On appeal, Beyer argues that the indictment failed to allege a mens rea for continuous sexual abuse of a child and that the trial court erred in reopening the evidence in the punishment phase of the trial after both parties had rested. We find (1) that Beyer failed to preserve his complaint about the indictment and (2) that the trial court did not abuse its discretion by reopening the evidence. As a result, we affirm the trial court's judgments.

I. Beyer's Complaint About the Indictment Is Unpreserved

Section 21.02 of the Texas Penal Code states that a person commits the offense of continuous sexual abuse of a child if,

> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
>
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.

TEX. PENAL CODE ANN. § 21.02(b). This portion of the statute requires no additional mens rea because an "act of sexual abuse" under Section 21.02 "means any act that is a violation of one or more of the [listed] penal laws," including aggravated sexual assault of a child. TEX. PENAL CODE ANN. § 21.02(c). As a result, "Section 21.02 . . . is defined in terms of other acts that by their terms require a culpable mental state" and "need not prescribe some additional mental state

because its actus reus is merely the repeated commission of acts already requiring culpable mental states." *Lane v. State*, 357 S.W.3d 770, 776 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

Even so, Beyer argues that the indictment was fundamentally defective because it did not specify any level of mens rea for the offense of continuous sexual abuse of a child or for any underlying offense. In response, the State argues that Beyer complains of a defect in form or substance, which was required to be raised below. We agree.

Article 1.14(b) of the Texas Code of Criminal Procedure states,

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

TEX. CODE CRIM. PROC. ANN. art. 1.14(b).

The State's indictment alleged that Beyer was charged with continuous sexual abuse of a child, correctly referred to Section 21.02 of the Texas Penal Code as the statute of offense, and listed several predicate offenses of aggravated sexual assault with a child. Beyer's argument is not that the indictment was so defective that it failed to allege the crime of continuous sexual abuse of a child—it is only that the indictment failed to allege a mens rea.

This Court has previously rejected the argument that a failure to allege a mens rea constitutes a fundamental defect. *Piland v. State*, 453 S.W.3d 473, 479–80 (Tex. App.—Texarkana 2014, pet. ref'd). This is because the "omission of an element of the offense . . . does not prevent the instrument from being an information." *Smith v. State*, 494 S.W.3d 243, 247 (Tex. App.—Texarkana 2015, no pet.) (concluding that "[b]ecause the information is sufficient to

identify the penal statute under which the State intends to prosecute, the error is not a 'fundamental' error") (quoting *Mantooth v. State*, 269 S.W.3d 68, 72 (Tex. App.—Texarkana 2008, no pet.)) (The Texas Court of Criminal Appeals held, in *Studer* [*v. State*, 799 S.W.2d 263, 272 (Tex. Crim. App. 1990)], that "the language in Art. V., § 12 [of the Texas Constitution], 'charging a person with the commission of an offense,' does not mean . . . that each element of the offense must be alleged in order to have an indictment or information as contemplated by Art. V, § 12.").

As a result, Beyer "was required to assert any objection 'to any defect, error, or irregularity of form or substance in [the] indictment' before trial," and the omission of a mens rea was such a defect. *Nguyen v. State*, 506 S.W.3d 69, 78 (Tex. App.—Texarkana 2016, pet. ref'd) (quoting TEX. CODE CRIM. PROC. ANN. art. 1.14(b)). By failing to raise the issue below, Beyer failed to preserve the complaint he now asserts for the first time on appeal. Accordingly, we overrule his first point of error.

II. The Trial Court Did Not Abuse Its Discretion by Reopening the Evidence

The decision to reopen is left to the trial court's sound discretion." *Cuba v. State*, 905 S.W.2d 729, 733 (Tex. App.—Texarkana 1995, no pet.) (citing *Cain v. State*, 666 S.W.2d 109 (Tex. Crim. App. 1984), *overruled on other grounds by Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003)). Article 36.02 "provides that the trial court 'shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appears that it is necessary to a due administration of justice.'" *Peek*, 106 S.W.3d at 75 (quoting TEX. CODE CRIM. PROC. ANN. art. 36.02)).

Here, both parties rested and closed their punishment case before taking a lunch break. The charge had not been read to the jury and argument had not begun. After the break, the State asked to reopen the evidence to call Courthouse Deputy Monty Rodgers because it learned that Beyer was allowed to make a phone call during lunch and "was overheard very loudly saying he intended to make very vulgar and inappropriate comments to the victim at the conclusion of trial." Over objection, the trial court allowed the State to reopen the evidence. Rodgers testified, "I heard him saying that he was going to turn and look at the victim and her family in the face and tell them to suck his dick . . . . He also said what are they going to do to me, hold me in contempt."

Beyer argues that the trial court erred in admitting this evidence under Article 36.02. Article 37.07 of the Texas Code of Criminal Procedure provides that during the punishment phase of trial, evidence as to any matter deemed relevant to sentencing may be admitted. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Supp.). Evidence is relevant to sentencing if it is "helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Rodriguez v. State*, 203 S.W.3d 837, 842 (Tex. Crim. App. 2006). Such evidence includes the defendant's character. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1). Rodgers's testimony provided material evidence bearing on Beyer's character, including his attitude toward the victim, lack of remorse, and likelihood of non-rehabilitation. As a result, we find that the trial court did not abuse its discretion in concluding that Rodgers's testimony was necessary to a due administration of justice.

Also, Article 36.02 "does not limit a trial court's discretion to reopen a case at any time before argument has concluded." *Swanner v. State*, 499 S.W.3d 916, 920 (Tex. App.—Houston

[14th Dist.] 2016, no pet.) (citing *Smith v. State*, 290 S.W.3d 368, 373 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd)). Instead, "[t]he statute merely mandates certain circumstances in which a trial court is *required* to reopen the evidence before argument is concluded." *Id.*; *see Cuba*, 905 S.W.2d at 733 ("[T]he trial court must reopen a case when the witness is present and ready to testify, the request to open has been made before the charge was read to the jury and final arguments were made, and the judge has some indication of what the testimony will be and is satisfied that it is material and bears directly on the main issues in the case.").

We conclude that the trial court did not abuse its discretion by granting the State's request to reopen the evidence before closing arguments began. As a result, we overrule Beyer's last point of error.

III. Conclusion

We affirm the trial court's judgments.

Ralph K. Burgess
Justice

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