AFFIRMED AS MODIFIED and Opinion Filed June 4, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00574-CR

FRANCO PEREZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1056586-P

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Whitehill

Appellant pled no contest to one count of indecency with a child by contact. After a bench trial, the trial court placed him on deferred adjudication community supervision. Appellant raises one appellate issue challenging the sufficiency of the evidence to support the order. We overrule his issue, modify the order to correct an error, and affirm.

I. BACKGROUND

Appellant was indicted for indecency with a child by contact. We refer to the complainant with the pseudonym "Paula."

Appellant pled no contest, and the trial judge proceeded with a bench trial. Paula and three other witnesses testified. The judge orally found that there was sufficient evidence of appellant's guilt, deferred a finding of guilt, and placed appellant on deferred adjudication community supervision for three years.

Appellant timely appealed. *See Rabbani v. State*, 494 S.W.3d 778, 779 n.1 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (per curiam) (deferred adjudication orders are appealable).

II. APPELLANT'S ISSUE

Appellant argues that we should review the sufficiency of the evidence under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), even though he pled no contest. We reject his argument because it is contrary to binding precedent.

Jackson does not apply "where a defendant knowingly, intelligently and voluntarily enters a plea of guilty or nolo contendere." *Ex parte Williams*, 703 S.W.2d 674, 682 (Tex. Crim. App. 1986). Rather, the Texas Code of Criminal Procedure governs. *Talley v. State*, No. 05-08-00238-CR, 2008 WL 5177377, at *2 (Tex. App.—Dallas Dec. 11, 2008, pet. ref'd) (not designated for publication).

Under article 1.15, when a defendant waives a jury and pleads "no contest," the State must introduce sufficient evidence to support the defendant's plea and establish the defendant's guilt. *Id*. (citing TEX. CODE CRIM. PROC. art. 1.15). The trial court has the authority to consider the facts and find the defendant guilty, guilty of a lesser included offense, or not guilty. *See McGill v. State*, 200 S.W.3d 325, 330

(Tex. App.—Dallas 2006, no pet.) (trial court's authority after guilty plea); TEX. CODE CRIM. PROC. art. 27.02(5) (nolo contendere plea has same legal effect as guilty plea). The evidence to support a "no contest" plea is sufficient if it embraces every essential element of the offense charged. *Wright v. State*, 930 S.W.2d 131, 132 (Tex. App.—Dallas 1996, no pet.). But the State is not required to prove the defendant's guilt beyond a reasonable doubt. *Talley*, 2008 WL 5177377, at *2.

Thus, because appellant doesn't challenge the validity of his no contest plea, our review is limited to determining whether there is evidence embracing every essential element of the offense charged, including identity. *See Wright*, 930 S.W.2d at 132; *see also O'Shea v. State*, No. 05-18-00094-CR, 2019 WL 1649374, at *2 (Tex. App.—Dallas Apr. 17, 2019, pet. ref'd) (mem. op., not designated for publication).

Appellant argues that "there was not enough evidence of identity to satisfy the *Jackson* standard." However, we will review his argument under the proper standard of review discussed above.

The State had to present evidence that appellant engaged in sexual contact with a child younger than seventeen. *See* TEX. PENAL CODE § 21.11(a)(1). The record shows that it did.

As relevant here, "sexual contact" means any touching by a person of any part of the child's genitals with intent to arouse or gratify the sexual desire of any person. *See id.* § 21.11(c)(1).

Dallas Police Lieutenant Lisette Rivera testified that in June 2010 she observed Paula give a forensic interview at the Dallas Children's Advocacy Center. Rivera learned that appellant was Paula's mother's boyfriend, and Paula was able to identify him by name. Paula described an offense that had taken place earlier in 2010, and an indecency with a child case was filed. Paula was five years old at the time of the offense. Rivera opined, based on her training and experience, that the kind of contact Paula described was for the purpose of arousing and gratifying the sexual desire of an individual.

Paula's uncle testified that in 2010 Paula was living with her mother, her grandmother, her sibling, and sometimes appellant. At some point in 2010 he learned that something inappropriate had happened with Paula and that appellant was involved. Paula's uncle called the police. On cross-examination, Paula's uncle clarified that Paula did not make an allegation to him, so apparently someone else told him about the offense.

Paula testified that she was fourteen years old and in the eighth grade. She said she remembered living with her mother before she was in elementary school. She said that her mother's boyfriend lived there with her, but she didn't remember his name or who he was. She said that something inappropriate happened with her while she was living with her mother, her mother's boyfriend, her grandmother, and her siblings, but she said she was "[a]bout 11 or 12" when it happened.

Regarding the inappropriate incident, Paula said, "He touched me," and that it happened during the day when her mother and grandmother had gone to the store. She also said that she was "really young" at the time. She said her mother's boyfriend went into the restroom with her and used his hand to touch the part of her body she uses to pee.[1]

Appellant's sole witness was a forensic psychiatrist who had evaluated appellant three different times. She concluded that appellant was truthful when he denied the offense against Paula and that appellant had no characteristics or traits of a pedophile or predator.

Although at trial Paula wasn't able to identify appellant as the person who touched her genitals in 2010, the test is whether the State introduced evidence embracing every element of the offense—not that evidence's strength. Nonetheless, the State adduced evidence that in 2010 Paula accused appellant of committing this offense.

We conclude that the evidence as a whole embraced every element of the charged offense, including appellant's identity as the offender, and was thus sufficient under the applicable standard of review. Accordingly, we overrule appellant's sole issue.

[1] Additionally, a video recording of Paula's June 7, 2010 forensic interview (in Spanish) was admitted into evidence. The record contains no translation. However, at one point Paula emphatically touched her own crotch with her hand. Paula answered the next question, "Un papa." The interviewer then asked her, "Como se llama?" and Paula answered, "Franco," which is appellant's first name.

III. ERROR IN THE ORDER

The State raises a cross-issue identifying an error in the order. Specifically, the order recites that appellant's deferred adjudication community supervision period is five years, but the trial judge orally ordered the period to be three years.

The oral pronouncement controls. *See Burt v. State*, 445 S.W.3d 752, 757 (Tex. Crim. App. 2014). We sustain the State's cross-issue. *See Agbogwe v. State*, 414 S.W.3d 820, 841 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (correcting erroneous community supervision provision from one year to two years); *Asberry v. State*, 813 S.W.2d 526, 531 (Tex. App.—Dallas 1991, pet. ref'd).

IV. DISPOSITION

We modify the order of deferred adjudication to recite a three year deferred adjudication community supervision period. We affirm the order as modified.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Tex. R. App. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FRANCO PEREZ, Appellant	On Appeal from the 203rd Judicial District Court, Dallas County, Texas
No. 05-19-00574-CR V.	Trial Court Cause No. F-1056586-P.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Whitehill. Justices Osborne and Carlyle participating.

Based on the Court's opinion of this date, the trial court's Order of Deferred Adjudication is **MODIFIED** as follows:

> The section that reads "PERIOD OF DEFERRED ADJUDICATION COMMUNITY SUPERVISION: 5 YEARS" is changed to "PERIOD OF DEFERRED ADJUDICATION COMMUNITY SUPERVISION: 3 YEARS."

We **AFFIRM** the Order of Deferred Adjudication as modified.

Judgment entered June 4, 2020.