

Affirm and Opinion Filed June 8, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00352-CR

No. 05-19-00353-CR

FELIPE GOMEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-1575558-P, F-1575559-P**

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Molberg

Following a trial involving two separate offenses, a jury convicted Felipe Gomez of sexual assault of a child, L.S., his stepson. The jury assessed punishment on each of the two charges at twenty years' imprisonment in the Texas Department of Criminal Justice's Institutional Division. The trial court then stacked the sentences and ordered them to run consecutively. Gomez appeals both judgments. He argues the judgments are void because the court lacked jurisdiction, and he also asks us to reverse on two other grounds. For the reasons that follow, we affirm.

BACKGROUND

Gomez was L.S.'s stepfather. At the time Gomez and L.S.'s mother married, L.S. lived in El Salvador, where he was born. L.S. moved to the United States in 2005, when he was thirteen years of age.

In October, 2016, warrants were issued for Gomez's arrest in connection with the offenses at issue here. After those warrants were issued, but before the indictments were returned, the 203rd Judicial District Court appointed counsel for Gomez on the basis of his indigence.

In November 2016, a grand jury empaneled by the 282nd Judicial District Court returned the two indictments at issue, which charged Gomez with sexually assaulting L.S., a child under 17 years of age, by penetrating L.S.'s anus with his sexual organ, once on or about September 5, 2005 (F-1575558-P), and again or about August 1, 2006 (F-1575559-P). The record contains no indication that the cases were filed elsewhere before being filed in the 203rd Judicial District Court.

Gomez pleaded not guilty to both charges, which were tried together to a jury. During trial, the State presented testimony from L.S., his mother, a police detective, and two employees from the Dallas Children's Advocacy Center. Because much of the testimony is unrelated to the issues Gomez raises on appeal, we do not discuss all of the evidence here.

L.S. testified about multiple acts of sexual abuse by Gomez, including having L.S. touch Gomez's penis, inserting Gomez's penis into L.S.'s mouth, and multiple

events in which Gomez penetrated L.S.'s anus with Gomez's sexual organ. L.S. testified that Gomez told him he could not tell his mother what happened and that he did not tell her because he wanted to protect her.

L.S. also testified that he, his mother, and his brother and sister moved out around 2008 or 2009. He had not told anyone about the abuse at that point, and Gomez was no longer in his life. L.S. believed Gomez had gone to Mexico for good.

In 2015, however, L.S. learned Gomez had returned to the United States. L.S. worried he would be abused again and worried what might happen to his younger brother. L.S. then told his mother that Gomez had abused him since L.S. moved to the United States and that he did not want to see him. L.S.'s mother called the police, and L.S. talked with the police and a forensic interviewer at the Dallas Children's Advocacy Center.

L.S.'s mother testified that because of the length of time that had passed since the abuse ended, a detective worked with her to make a call to Gomez from the police station. Her call to Gomez was recorded. On the call, she and Gomez spoke to one another in Spanish, and she confronted Gomez about his abuse of L.S.

The call recording was offered and admitted into evidence with no objections. Portions of the recording were played for the jury. On direct-examination, the prosecutor asked L.S.'s mother to explain various portions of the call. In response, L.S.'s mother explained that when she asked Gomez about the abuse, he denied it at times but also said that L.S. had induced him, that he was guilty of the abuse of L.S.,

and that he was sorry for all the harm that he caused. She also testified that Gomez called himself the devil and a monster and blamed alcohol and drugs.

In addition to the recording, a transcript of the call was also admitted into evidence. The call transcript was offered and admitted over Gomez's objection.

After deliberations, the jury returned findings of guilt on both charges and assessed punishment at twenty years' imprisonment on each charge. Following return of the verdicts, the State requested, and the trial court ordered, that the sentences be stacked. The court then entered judgments convicting Gomez on both charges and sentencing him to twenty years' imprisonment on each charge, with the charges to run consecutively.

Gomez filed motions for new trial, which were denied. He also filed notices of appeal, and the trial court appointed him new counsel.

ANALYSIS

In Gomez's first two issues, he asks us to reverse the judgments, first because of alleged ineffectiveness of his trial counsel, who did not object to the admission of the recording, and second because of alleged error in the court's charge. In his third issue, Gomez argues the judgments are void and the court lacked jurisdiction.

Ineffective Assistance of Counsel

In his first issue, Gomez argues that under *Strickland v. Washington*, 466 U.S. 668 (1984), his trial counsel provided him with ineffective assistance because she failed to object to the admission of the recording.

Gomez argues that because L.S.'s mother and the detective answered questions about the recording and statements in Spanish, his trial counsel should have objected and sought to exclude the information under Texas Rule of Evidence 1009. He argues that, under *Strickland*, his counsel's failure to object to the recording amounted to ineffective assistance because there was no reasonable trial strategy to her failure to object and because the jury would not have convicted Gomez without that recording.

We disagree. First, as to the admission of the evidence generally, Gomez has not demonstrated that the court abused its discretion when admitting the recording under the circumstances here. *See* TEX. R. EVID. 1009; *Nois v. State*, No. 05-15-00203-CR, 2016 WL 891086, at *8–9 (Tex. App.—Dallas Mar. 9, 2016, no pet.) (mem. op., not designated for publication) (finding no abuse of discretion in determining witness was qualified to translate the recordings); *Castrejon v. State*, 428 S.W.3d 179, 184 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (no abuse of discretion in admitting foreign language recording and translation by person who was not a qualified expert). Like the records in those cases, the record before us contains no indication that L.S.'s mother and the detective were unqualified to translate or that the information they translated was inaccurate.

To satisfy *Strickland* and establish ineffective assistance of counsel, Gomez must demonstrate by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable

probability that the result would have been different but for that deficient performance. See *Strickland*, 466 U.S. at 687; *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *Rubio v. State*, 596 S.W.3d 410 (Tex. App.—Dallas Feb. 11, 2020, pet. filed).

He has not done so here. There is no indication in the record that Gomez’s trial counsel’s performance fell below an objective standard of reasonableness based on prevailing norms, and even without the recording, the jury could have rendered the same verdicts. Thus, even if Gomez had satisfied the first *Strickland* prong, he has failed to satisfy the second, as he has not shown a reasonable probability that, but for his counsel’s alleged errors, the result would have been any different. *Strickland*, 466 U.S. at 687, 694.

Court’s Charge to the Jury

In his second issue, Gomez argues the trial court erred by providing the jury with a definition of “reasonable doubt” in the court’s charges, contrary to *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000).

The court’s two charges included language stating, “The State is not required to prove that a person is guilty beyond all doubt; the State must exclude all reasonable doubt about the person's guilt.”¹

¹ We quote the language used in the court’s charges, which is similar, but not identical, to the language Gomez incorrectly quotes in his brief. Gomez quotes them as stating, “It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution’s proof excludes all reasonable doubt concerning the defendant’s guilt.” That specific language was not included in the charges given.

Gomez did not object to the court’s charges at trial. However, we review all alleged charge error on appeal, regardless of error preservation, considering first whether error occurred, and if so, whether sufficient harm occurred to justify a reversal, which depends on whether error was preserved. *See Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

In *O’Canas v. State*, 140 S.W.3d 695, 702 (Tex. App.—Dallas 2003, pet. ref’d), we concluded that the language Gomez challenges in his brief “simply states the legally correct proposition that the prosecution’s burden is to establish appellant’s guilt beyond a *reasonable* doubt and not *all possible* doubt.” *Id.* at 702 (emphasis in original); *see Wilson v. State*, No. 05-18-00801-CR, 2019 WL 3491931, at *3 (Tex. App.—Dallas Aug. 1, 2019, no pet.) (mem. op., not designated for publication) (collecting cases).

Similar to our conclusions in those cases, the language used in the court’s charges provided a legally correct proposition that neither defined reasonable doubt nor attempted to aid the jurors in determining whether their doubts were reasonable.

Gomez has not demonstrated charge error, and we overrule his second issue.

Trial Court’s Jurisdiction

In his third issue, Gomez argues the trial court lacked jurisdiction and the judgments are void because the case was originally presented for indictment in the 282nd Judicial District Court and there are no orders transferring the cases to the 203rd Judicial District Court, which rendered the judgments.

As Gomez concedes, he filed no pleas to the jurisdiction in the trial court, thereby waiving any error. *See Wilson v. State*, No. 05-18-00801-CR, 2019 WL 3491931, at *4 (Tex. App.—Dallas Aug. 1, 2019, no pet.) (mem. op., not designated for publication); *Mills v. State*, 742 S.W.2d 831, 834–35 (Tex. App.—Dallas, 1987, no writ.). Even if Gomez had preserved error, no transfer order was necessary here, where there is nothing in the record suggesting the indictments were filed in any other court or appeared on any other dockets before they were filed in the 203rd Judicial District Court. *See Bourque v. State*, 156 S.W.3d 675, 678 (Tex. App.—Dallas 2005, pet. ref’d) (cases returned by grand jury are not necessarily assigned to court impaneling the grand jury); *Wilson*, 2019 WL 3491931 at *4 (collecting cases).

We overrule Gomez’s third issue.

CONCLUSION

We affirm the trial court’s judgments.

/Ken Molberg/

KEN MOLBERG
JUSTICE

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JUDGMENT

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Based on the Court's opinion of this date, the judgment of the trial court is
AFFIRMED.

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