In Discretionary Transfer motion, on or about language allows the State to prove a date other than the date proven in court, as long as it is anterior to the presentment of the indictment and within the statutory limitation period.[Eguade v. State](17-3-12A)

On July 31, 2017, the El Paso Court of Appeals held that a discretionary transfer order (and subsequent indictment) which alleged that the offense occurred on or about January 1, 2003, was sufficient, even where all of the allegations in the record focus on acts that allegedly occurred in 2005.

¶ 17-3-12A. **Eguade v. State**, No. 08-15-00268-CR, --- S.W.3d ----, 2017 WL 3224863 (Tex.App.—El Paso, 7/31/2017).

**Facts:** The Eguade and De La Rosa families lived next door to each other in the San Elizario community. Appellant’s mother is L.D.R.’s godmother and according to L.D.R., the two families had a family-like relationship.

On January 31, 2010, when L.D.R. was in the fifth grade, she told her brother, Hector De La Rosa that Appellant had sexually abused her when she was getting ready to enter the first grade. Hector immediately told their mother, who called the police. El Paso Sheriff’s Deputy Sergio Juarez responded to the call at the De La Rosa residence and created an initial report which he turned over to a detective for further investigation. On February 9, 2010, Detective Joe Zimmerly interviewed L.D.R. at a child advocacy center.

At the time of trial, L.D.R. was sixteen years old and a sophomore in high school. She testified that Appellant raped her when she was five years old, going into the first grade at Borrego Elementary, and her teacher during this time was Mrs. De Leon. L.D.R. related that the first time occurred at Appellant’s house in his mother’s bathroom. When L.D.R. went to use the bathroom, Appellant was at the door when she was finished. He touched her, pulled down his shorts, and inserted his penis into her vagina while she was lying on her back on the floor. While she and Appellant were in the bathroom, Appellant’s sister knocked on the door and Appellant told L.D.R. to be quiet. When he left, he told her to stay in the bathroom for a while.

The next occasion occurred in the Eguade’s hallway bathroom. Again, she went to the bathroom and Appellant was waiting for her at the door when she was finished. He put his penis in her vagina, and then he sat down on the toilet and forced L.D.R. to put her mouth on his penis by putting his hand on the back of her neck. She testified that she saw a white substance come out of his penis. L.D.R. never told anyone because once she learned that what had happened was wrong, she felt guilty and was afraid that the two families would part ways.

On cross-examination, L.D.R. testified that she felt pain, but did not remember whether she bled. One of the reasons she never told anyone was because Appellant made her feel as though it was her fault. Even after her mother learned of the abuse, L.D.R. did not speak extensively because she does not like talking about what happened. After she made her outcry, no other incidents occurred.

The State rested its case and moved to dismiss Count II given that there was no evidence regarding anal penetration. Appellant moved for directed verdicts on Counts I and III, which the trial court denied.

Mrs. De La Rosa testified as the first defense witness. On January 31, 2010, Deputy Juarez responded to her call and she informed him of L.D.R.’s outcry. Mrs. De La Rosa began taking L.D.R. to counseling because she was having emotional problems and difficulty at night. She did not recall informing law enforcement officials that L.D.R.’s abuse occurred during mutual cookouts with the Eguades. She also did not remember giving officers the five dates of occurrence for the abuse, but did recall that the two families spent significant time together, including traveling together.

On cross-examination, Mrs. De La Rosa explained that she had known the Eguade family for 25 years, and that before the abuse, the two families were extremely close. L.D.R. is shy, suffers from weight problems, and becomes very angry whenever she has to talk about the abuse. L.D.R.’s outcry made her feel helpless and angry. She then recalled that she did in fact give law enforcement the dates of abuse which were an approximation because the child was too young to give precise dates. Mrs. De La Rosa remembered that L.D.R. told her she was around five or six years old when the events at issue occurred.

Detective Gil, a twenty-one year veteran of the sheriff’s department, testified that she took Mrs. De La Rosa’s and Hector’s statements in 2010 after L.D.R. made her outcry. She did not recall reading the statement back to Mrs. De La Rosa, but explained that Mrs. De La Rosa initialed each paragraph in her statement to verify its contents.

L.D.R.’s counselor, Martha Dominguez, testified that she had seen L.D.R. approximately nineteen times. She observed that L.D.R. was generally a happy person, and during counseling, Dominguez helped her focus on reducing the anxiety she experienced about having to testify. L.D.R. only opened up to her once concerning the abuse. Dominguez has thirty years of practice as a licensed social worker and has treated approximately three hundred sex-abuse victims. She opined that family support is one the most important factors in how a child copes with sexual abuse. She also indicated that during her time with L.D.R., she never recanted her statement.

Mrs. Eguade testified that she was aware of the charges against her son and confirmed that he was fourteen years old at the time and L.D.R. was five years old. As L.D.R.’s godmother, she cared for L.D.R., but she never noticed that anything was bothering the child. On cross-examination, she minimized her family’s relationship with the De La Rosas. They rarely went to each other’s homes and when the De La Rosas did come over, they stayed outside. She acknowledged that L.D.R. had been at her home while Appellant was present. When Appellant was much younger, she supervised him but was unable to monitor him all of the time and it was impossible for her to know everything that he did outside of her presence. She acknowledged the seriousness of the charges and while she would do anything for her son, she would not lie.

Finally, Appellant testified. At the time of trial, he was twenty-five years old. He claimed that L.D.R. was lying, he would never abuse her, and he was never alone with her. Initially, Appellant attended Texas A & M University on scholarship, but he returned to El Paso after losing the scholarship due to low grades. He was placed on academic suspension at El Paso Community College and was finishing his engineering degree at The University of Texas at El Paso. He had lost two jobs and was unable to join the Air Force because of his pending charges.

**Held:** Affirmed.

**Opinion:** In his first point of error, Appellant maintains that the order waiving juvenile court jurisdiction was defective and deprived the district court of jurisdiction over Count III. He has waived error by failing to object in the trial court. See TEX.R.APP.P. 33.1(a). Nothing in the record indicates Appellant filed a written motion objecting to the trial court’s assumption of jurisdiction, as required by Article 4.18(a) of the Texas Code of Criminal Procedure, which states:

A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.

TEX.CODE CRIM.PROC.ANN. art. 4.18(a)(West Supp. 2016).

Even had he properly preserved this issue, it is without merit. Appellant complains that the January 1, 2003, aggravated sexual assault offense of which he was convicted in Count III was not a criminal act encompassed within the juvenile court’s transfer order.

It is well-settled that a juvenile court waives jurisdiction only with respect to conduct, and a criminal court has jurisdiction to adjudicate only the same conduct for which the juvenile court transferred jurisdiction. Livar v. State, 929 S.W.2d 573, 574 (Tex.App.–Fort Worth 1996, pet. ref’d); Ex parte Allen, 618 S.W.2d 357, 361 (Tex.Crim.App. 1981)(op. on reh’g). Appellant argues that the juvenile court waived its jurisdiction based on the five allegations that occurred in 2005 (June 10, July 16, September 9, November 12, and December 2) but that the jury was told it could convict Appellant based on 2003 allegations alleged in the indictment issued after juvenile jurisdiction was waived. He relies on Ex parte Allen, 618 S.W.2d 357, 361 (Tex.Crim.App. 1981)(op. on reh’g), for his claim that the State acquired a transfer order relating to one criminal act of a juvenile and then sought indictment for a separate criminal act allegedly committed by the same juvenile. However, the State may, in a criminal court, charge the juvenile with an offense that can be proven if it is based on conduct for which the juvenile court has ordered the juvenile transferred. See Brosky v. State, 915 S.W.2d 120, 126 (Tex.App.–Fort Worth 1996, pet. ref’d).

The State readily acknowledges that the date of the conduct alleged in the State’s indictment is on or about January 1, 2003, and that it is different than any of the dates set out in the juvenile transfer record. It directs us to the Court of Criminal Appeals’ decisions that it need not allege a specific date in an indictment. Mitchell v. State, 168 Tex.Crim. 606, 330 S.W.2d 459, 462 (1959); Sledge v. State, 953 S.W.2d 253, 256 (Tex.Crim.App. 1997). The “on or about” language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period. Sanchez v. State, 400 S.W.3d 595, 600 (Tex.Crim.App. 2013); Sledge, 953 S.W.2d at 256; Scoggan v. State, 799 S.W.2d 679, 680 n.3 (Tex.Crim.App. 1990)(“The State is not bound by the date alleged in the indictment ... so long as the date proved is a date anterior to the presentment of indictment and the crime’s occurrence is not so remote as to be barred by limitation.”); Thomas v. State, 753 S.W.2d 688, 692 (Tex.Crim.App. 1988) (“Where an indictment alleges that some relevant event transpired ‘on or about’ a particular date, the accused is put on notice to prepare for proof that the event happened at any time within the statutory period of limitations.”).

The indictment alleged that the offense occurred on or about January 1, 2003, but all of the allegations in the record focus on acts that allegedly occurred in 2005. This on or about language allows the State to prove a date other than the 2003 date as long as it is anterior to the presentment of the indictment and within the statutory limitation period, which had not expired in this instance.

Moreover, courts remain cognizant of the difficulty children often have in remembering specific dates or ages, and that they frequently relate the time of the occurrence of an event to other significant dates or events, such as holidays, or seasons, or the grade they are in at school at the time of the event, as L.D.R. did in this instance. See, e.g., Michell v. State, 381 S.W.3d 554, 561 (Tex.App.–Eastland 2012, no pet.)(child victim could not give specific dates of instances of sexual abuse, but was able to give details of where they took place, the grade she was in, or what the season of the year was at the time of the abuse); see also, e.g., Lane v. State, 357 S.W.3d 770, 773–74 (Tex.App.–Houston [14th Dist.] 2011, pet. ref’d); Smith v. State, 340 S.W.3d 41, 48–49 (Tex.App.–Houston [1st Dist.] 2011, no pet.).

**Conclusion:** Appellant has failed to show that the offense for which he was prosecuted and convicted, as alleged in Count III of the indictment, did not arise out the same conduct for which the juvenile court waived and transferred its jurisdiction. The “on or about” allegations in both the juvenile court’s certification proceedings and in the indictment cover the time of the occurrence of the offense described by L.D.R. in her testimony at trial. Because Appellant has not demonstrated any jurisdictional defect to his prosecution and conviction, we overrule Issue One. Judgment Affirmed.