Opinion filed August 10, 2017

In The

Eleventh Court of Appeals

No. 11-15-00174-CR

JOHN JUDE MORALES, Appellant

V.

THE STATE OF TEXAS, Appellees

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court Cause No. 19491B

M E M O R A N D U M O P I N I O N

John Jude Morales pleaded not guilty to the felony offense of continuous sexual abuse of a child.[1] The jury found Appellant guilty and assessed his punishment at confinement for forty years. In issues one and two, Appellant asserts that the trial court erred when it denied his motion to suppress in violation of the Fifth Amendment and the Texas Code of Criminal Procedure because he did not

[1]TEX. PENAL CODE ANN. § 21.02 (West Supp. 2016).

knowingly and voluntarily confess. In issues three and four, Appellant asserts that there was insufficient evidence to prove penetration of the victim's sexual organ and to prove the parties' respective ages. We affirm.

On December 25, 2013, thirteen-year-old A.L.[2] gave birth to a baby in the bathtub of her home. The baby was born prematurely and did not survive.

Detective Shawn Montgomery of the Abilene Police Department investigated the circumstances that surrounded the baby's death. A.L. at first told Detective Montgomery that the baby's father was an ex-boyfriend, Justin White. DNA test results indicated that Justin White was not the baby's father. A.L. then revealed that Appellant, A.L.'s mother's boyfriend, had been sexually assaulting her.

In May 2014, Detective Montgomery interviewed Appellant about A.L.'s allegations; he denied them. Appellant was not under arrest during this meeting, and he voluntarily gave a DNA sample. A paternity test revealed that Appellant was the baby's father.

On June 23, 2014, Detective Montgomery brought Appellant to the police station for a second interview. Law enforcement personnel recorded the June 23 interview on videotape. Detective Montgomery read Appellant his *Miranda*[3] warnings at the beginning of the interview. Appellant waived his rights and voluntarily talked with Detective Montgomery.

Initially, Appellant denied any sexual involvement with A.L., but his story changed after Detective Montgomery revealed the results of the DNA test. Appellant then told Detective Montgomery that sometime in June or July 2013, he woke up, his penis was out, and A.L. was on top of him. Appellant made the claim that A.L. sexually assaulted him, not the other way around.

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[2]A.L. is a pseudonym we use to refer to the victim in this case.

[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).

During that same conversation, Appellant told Detective Montgomery that he had sex with A.L. on another occasion. On that occasion, according to Appellant, A.L. threatened to expose their sexual relationship to her mother if he did not comply with her sexual demands. Detective Montgomery arrested Appellant.

After Detective Montgomery arrested Appellant, he said, "If I'm under arrest, that's all I got to say." Nevertheless, Appellant continued talking, and Detective Montgomery continued to ask Appellant questions. Appellant confessed to having sex with A.L. two or three times, but he continued to blame A.L.

At trial, Appellant sought to suppress the entire recording; he alleged that his level of intoxication prevented him from understanding his rights. But on appeal, in his first and second issues, Appellant asserts that the trial court erred when it denied his motion to suppress because Detective Montgomery continued to question him after he invoked his Fifth Amendment right to remain silent.

Generally, to preserve an error for appellate review an appellant must demonstrate (1) that he made a timely and specific request, objection, or motion and (2) that the trial judge ruled on it. TEX. R. APP. P. 33.1; *Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003). Although appellate courts may consider alternate theories of law that *support* a trial court's decision, reviewing courts may not, for the first time on appeal, consider new theories of law to reverse the trial court's decision. *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002). Because he failed to raise such an issue at the hearing on his motion to suppress or at trial, Appellant has not presented any issue relating to his Fifth Amendment right to remain silent.

Even if we were to assume that Appellant had preserved those issues, the error, if any, would be harmless. Appellant did not invoke his right to remain silent at any point before he stated, "If I'm under arrest, that's all I got to say." Although Detective Montgomery continued to ask Appellant questions, the information

obtained from Appellant merely duplicated the information obtained prior to any invocation of Appellant's rights. *See Ramos v. State*, 245 S.W.3d 410, 418 (Tex. Crim. App. 2008) (quoting *Miranda v. Arizona*, 384 U.S. at 473–74 (1966)) ("If the individual [in custody] indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."). Appellant's statements that he had sex with A.L. on *more than one* occasion occurred before he invoked his right to remain silent. As such, the information was properly before the jury, and Appellant suffered no harm from the admission of the complained-of portion of the videotape. *See Estrada v. State*, 313 S.W.3d 274, 302 n.29 (Tex. Crim. App. 2010) (noting that when same or similar evidence is admitted without objection, either before or after the complained-of evidence, the erroneous admission of evidence is harmless). We overrule Appellant's first and second issues on appeal.

In his third issue on appeal, Appellant asserts that there was insufficient evidence to show that he penetrated A.L.'s female sexual organ more than once. In his fourth issue, Appellant argues that the evidence was also insufficient to show that A.L. was under the age of fourteen and that he was over the age of seventeen. We review a sufficiency challenge by asking whether any rational jury could have found Appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). We must review all of the evidence in the light most favorable to the jury's verdict and determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The jury may believe all, some, or none of a witness's testimony because the factfinder is the sole judge of the weight and credibility of the witnesses. *Brooks*, 323 S.W.3d at 899. We defer to the jury's resolution of any conflicting inferences raised in the evidence and presume that the jury resolved such conflicts in favor of the verdict. *Jackson*, 443

U.S. at 326; *Brooks*, 323 S.W.3d at 894; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

At trial, sexual assault nurse examiner Debra McCracken testified that A.L. reported that she was "having sex" with Appellant. A.L. clarified to McCracken that Appellant "put his thing inside me" and that "sometimes he would put his thing in her mouth." McCracken stated that, although A.L. reported being assaulted by Appellant four to five days prior to that meeting, she was not able to see any signs of any trauma because A.L. was on her period. Rachel Birch, a forensic DNA analyst, testified that DNA tests confirmed that Appellant was the father of A.L.'s baby. Certainly, in the absence of any other causative evidence, that is some evidence of penetration.

A.L. testified that, on July 4, 2013, when she was twelve, Appellant "molested" her. Appellant pulled his pants down and "started having sex with [A.L.]." A.L. stated, "He stuck his stuff inside mine," and when asked if Appellant put his penis inside of her, she replied, "Yes." A.L. asserted that Appellant threatened to hurt her mother if she ever told anyone about the incident. She then testified that she gave birth to a baby in a bathtub on Christmas Day. A.L. also stated that, on another occasion, Appellant ordered her to go to her room, and Appellant followed her and "put his stuff inside [her]." A.L. saved her underwear from that incident, as well as Appellant's T-shirt, which he used to wipe himself; she had put these items into a plastic bag. A.L. alerted Detective Montgomery that she had "proof" of the assault, but law enforcement officers were not able to retrieve the plastic bag. A.L. asserted that, prior to their arrival, Appellant had flushed the contents of the bag down the toilet. A.L. summarized that, after the first assault on July 4, 2013, Appellant subsequently assaulted at least three times per week, and she specified that he had sex with her in August and September 2013 and in January, February, March, April, May, and June 2014. A.L. explained that she did not

disclose the name of her baby's father because she was asked to lie by her mother and Appellant. Appellant indicated in his interview with Detective Montgomery that he was thirty years old.

Detective Frank Shoemaker, of the Abilene Police Department, testified that A.L. recanted the allegations against Appellant on one occasion. However, he also recalled that, in his experience with sexual assault cases, many child victims recant their allegations. A.L.'s mother, T.N., denied telling A.L. to lie to the police. T.N. also stated that A.L. had behavioral problems. On cross-examination, T.N. admitted that she had previously harbored a registered sex offender in her home. A video recording of T.N.'s visit with Appellant depicted T.N. as she talked about how she beat A.L. T.N. also admitted that she continued to write and visit Appellant in jail after he was arrested for sexually assaulting A.L.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found the essential elements of the alleged offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. Based on Appellant's own admissions, A.L.'s testimony, and the paternity test, a trier of fact could conclude that Appellant, an adult over the age of seventeen, penetrated A.L.'s sexual female organ on more than one occasion when she was twelve and thirteen years of age. We overrule Appellant's third and fourth issues on appeal.

We affirm the judgment of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

August 10, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J. and Bailey, J.