Opinion issued December 18, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00774-CR

GREGORY BRYAN MYERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1085666

MEMORANDUM OPINION

Appellant, Gregory Bryan Myers, appeals the jury's verdict that found him

guilty of aggravated sexual assault of a child.[1] The jury assessed his punishment at 7 years and 6 months in prison. In three points of error, appellant argues that (1) the evidence is legally and factually insufficient to support his conviction and (2) his trial counsel rendered ineffective assistance of counsel.

We affirm.

Background

The complainant, G.M., who was eight years old at the time of trial, testified that she used to call her father "Daddy" but now she calls him by his first name because of the bad things he did to her when she was between the ages of four and six. The complainant used to spend weekends with appellant at his lake house or a Motel 8. The complainant testified to an incident when appellant was rubbing his "front private" on her leg and that his private touched her front privates. She also testified that his private got stuck. She testified to another incident when appellant touched her bottom with his finger and that he penetrated her bottom with his finger. She stated that it felt like appellant was trying to "dig out poo-poo." She also testified to another incident in which she and appellant were in the shower together and that his penis got stuck on her front private. When asked if his penis got stuck or if the earring on his penis got stuck, she testified that she did not remember. The complainant testified that she was afraid to tell anyone because appellant said he

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[1] *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (2)(B) (Vernon Supp. 2008).

would hurt her.

Betty Pollard, the complainant's mother, testified that on August 22, 2006 she noticed that the complainant was on her hands and knees in the bathtub. The complainant told her mother that her "daddy" makes her bathe this way at his house and that appellant touched her in ways that made her feel uncomfortable. Ms. Pollard testified that the complainant told her that when she would bathe at appellant's house, appellant would close the clear curtain over the tub and he would stand at the door, "playing with his penis." The complainant also told her mother about pornographic movies that were watched. Ms. Pollard recalled that the complainant said that abuse occurred at the Motel 8 in Humble and that appellant had "rubbed his penis on her and described to me how the penis piercing that he had gotten caught o[n] her labia. And she called it her vagina lips is what she called it." When the complainant was taken to Children's Assessment Center, she did not get medically examined. Ms. Pollard testified that the complainant told her that she waited a few months to tell her because appellant had threatened her. After the complainant got therapy, she told her mother that appellant had "played with her bottom." Ms. Pollard recalled that the complainant said that "it felt to her like he was sticking his finger in her bottom and trying to dig out poop."

Ms. Pollard further testified that the complainant would cry when appellant picked her up for scheduled visits and that she did not want to talk to appellant on the

phone. Ms. Pollard testified that CPS did not investigate the pornography incident because G.M. was with her biological father.

Patricia Myers, appellant's mother, testified that the complainant never told her that she was afraid of appellant or that any sexual abuse had occurred. Appellant did not testify at trial.

The jury found appellant guilty of aggravated sexual assault of a child, namely that appellant intentionally or knowingly caused the complainant's sexual organ to contact appellant's sexual organ.

Aggravated Sexual Assault

In his first and second points of error, appellant argues that the evidence is legally and factually insufficient to support his conviction.

Legal Sufficiency

In determining the legal sufficiency of the evidence, we review the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Escamilla v. State*, 143 S.W.3d 814, 817 (Tex. Crim. App. 2004). We may not re-weigh the evidence or substitute our judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). This standard of review is the same for both direct and circumstantial-evidence cases. *Fitts v. State*, 982 S.W.2d 175, 185

(Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). If there is evidence that establishes guilt beyond a reasonable doubt and the jury believes that evidence, the judgment must be affirmed. *Id*.

A person commits aggravated sexual assault of a child if the person intentionally or knowingly causes the sexual organ of a child to contact or penetrate the sexual organ of another person when the child is younger than 14 years of age. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (a)(2)(B).

Here, the complainant testified to multiple instances of sexual assault, including an incident in which appellant's penis came into contact with her sexual organ when she was younger than 14 years of age. In sexual abuse cases, the testimony of the child victim alone is sufficient to support the conviction. *Tear v. State*, 74 S.W.3d 555, 560 (Tex. App.—Dallas 2002, pet. ref'd); *Ruiz v. State*, 891 S.W.2d 302, 304 (Tex. App.—San Antonio 1994, pet. ref'd). Viewing this evidence in a light most favorable to the verdict, we conclude that a rational jury could have found the elements of aggravated sexual assault of a child beyond a reasonable doubt.

We overrule appellant's first point of error.

Factual Sufficiency

In his second point of error, appellant argues that the evidence is factually insufficient to support his conviction. Appellant argues that

> The State did not bring any evidence of the following important forensic matters: a medical examination of the child; any DNA or

> forensic fluid test results; fingerprints at the alleged scene of the crime in the motel; medical reports showing the alleged scars from the penis ring getting snagged on the child's outer vaginal lips or medical testimony to explain away the absence of such scarring due to curative and healing elements of the vaginal and pubic tissue; photographic evidence of any alleged scarring or damaged tissue relating to the alleged penis ring snagging.

Appellant also argues that the complainant testified inconsistently at times and failed to remember dates and locations of the assaults.

Factual sufficiency analysis is broken down into two prongs. First, we must ask whether the evidence introduced to support the verdict, although legally sufficient, is so weak that the jury's verdict seems clearly wrong and manifestly unjust. *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006) (quoting *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000)). Second, we must ask whether, considering the conflicting evidence, the jury's verdict, although legally sufficient, is nevertheless against the great weight and preponderance of the evidence. *Id*. at 415. In conducting this review, we view all of the evidence in a neutral light. *Id*. at 414. We are also mindful that a jury has already passed on the facts, and that we cannot order a new trial simply because we disagree with the verdict. *Id*. What weight to give contradictory testimonial evidence is within the sole province of the jury because it turns on an evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). Therefore, we must defer appropriately to the fact finder and avoid substituting our judgment for its judgment, and we may

find evidence factually insufficient only when necessary to prevent manifest injustice. *Id*. at 407; *see also Johnson*, 23 S.W.3d at 12.

The absence of physical evidence does not render the evidence factually insufficient. "The lack of physical or forensic evidence is a factor for the jury to consider in weighing the evidence." *Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). Here, the complainant testified to facts establishing that appellant committed aggravated sexual assault. *See* TEX. PENAL CODE ANN. §§ 22.021, 22.011. Regardless of other testimony and evidence, the complainant's testimony alone was all the jury needed to convict appellant. *See Tinker v. State*, 148 S.W.3d 666, 669–70 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The jury was entitled to accept the complainant's testimony. *See id*.; *see also Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Lacy v. State*, 899 S.W.2d 284, 287 (Tex. App.—Tyler 1995, no pet.); *Reed v. State*, 991 S.W.2d 354, 360 (Tex. Crim. App. 1999). Semen and DNA were not needed to corroborate the complainant's testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a), (b) (Vernon 2005) (stating that conviction under sections 22.011 and 22.021 of the Penal Code is supportable on uncorroborated testimony of victim of sexual offense).

Appellant's complaint that the complainant testified inconsistently likewise does not render the evidence factually insufficient. It is within the sole province of

the jury to reconcile conflicts, contradictions, and inconsistencies in the evidence. *Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982). The jury is also the judge of the credibility of the witnesses, and it is free to believe or disbelieve any portion of a witness' testimony. *Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

Here, the jury was presented with some inconsistent testimony from the complainant concerning the location of the alleged sexual assaults, as well as the exact date of the sexual assaults. The jury heard and considered the inconsistencies in the testimony and determined that appellant was guilty of aggravated sexual assault. Considering all of the evidence in the case, and deferring to the jury's role as the sole judge of the weight and credibility given to witness's testimony, we are unable to conclude that the inconsistencies in the testimony are enough to declare the verdict factually insufficient.

We overrule appellant's second point of error.

Ineffective Assistance of Counsel

In his third point of error, appellant argues that his counsel rendered ineffective assistance "by not calling witnesses beneficial to [appellant's] defense, objecting to inadmissible testimony, or presenting any mitigating evidence during the punishment phase. . . ."

The standard of review for evaluating claims of ineffective assistance of

counsel is set forth in *Strickland v. Washington*. 466 U.S. 668, 687–96, 104 S. Ct. 2052, 2064–69 (1984); *Thompson v. State*, 9 S.W.3d 808, 812–13 (Tex. Crim. App. 1999). Appellant must show both that (1) counsel's performance was so deficient that he was not functioning as acceptable counsel under the Sixth Amendment and (2) there is a reasonable probability that, but for counsel's error or omission, the result of the proceedings would have been different, i.e., the error or omission is sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 687–96, 104 S. Ct. at 2064–69. We must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). To overcome this presumption, any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

On appeal, appellant concedes that the limited record does not support his ineffective assistance challenge. We agree. Appellant did not file a motion for new trial. As such, the record is not sufficiently developed to allow us to do more than speculate as to the strategies of appellant's trial counsel. *See Jackson*, 877 S.W.2d at 771. Thus, we cannot say that appellant was denied effective assistance of counsel due to trial counsel's lack of presenting witnesses during the guilt-innocense phase, objecting to outcry testimony, and requesting the trial court to conduct a hearing to

determine the reliability of a witness during the punishment stage. Appellant has a more appropriate remedy in seeking a writ of habeas corpus to allow him the opportunity to develop evidence to support his complaints. *See Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000) (noting that post-conviction writ proceeding is preferred method for gathering facts necessary to substantiate ineffective assistance of counsel claim). Appellant's remedy is to file a writ of habeas corpus to create a record of his counsel's strategy during the trial. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon Supp. 2008).

We overrule appellant's third point of error.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Taft, Keyes, and Alcala.

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