Opinion issued January 5, 2012.

In The

Court of Appeals

For The

First District of Texas

NOS. 01-10-00903-CR
01-10-00904-CR

DEREK SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case Nos. 1214637, 1214638

MEMORANDUM OPINION

Derek Smith appeals his conviction for two charges of indecency with a child. *See* TEX. PENAL CODE ANN. § 21.11 (West 2011). Smith pleaded not guilty

to the jury, which convicted him on both charges. The trial court assessed punishment at two years' confinement on each charge, with the sentences to run concurrently. On appeal, Smith contends that the trial court erred by permitting the testimony of the forensic interviewer because she was not the proper outcry witness and that the evidence is insufficient to support his conviction. We affirm.

Background

Smith married Wendy M., the mother of M.M., the ten-year-old complainant, in December 2008. On March 4, 2009, Wendy reported that M.M. had been assaulted. M.M. was taken to the Children's Assessment Center where Lisa Holcomb conducted a forensic interview. Tonnis Hilliard, a Department of Family and Protective Services caseworker, was assigned to M.M.'s case. M.M. was removed from Wendy's home and his father Chris M. was given primary custody with Wendy having rights to supervised visitation.

At trial, M.M. testified that on Valentine's Day 2009, Wendy had gone to the grocery store. While Wendy was away, Smith touched M.M.'s anus with his fingers. M.M. also testified that, a few days before the forensic interview, Smith touched M.M's penis. M.M. testified that, beginning in December, Smith touched M.M.'s penis or anus every few days. Smith threatened to destroy M.M's video game system if he told anyone what Smith had done.

Outcry Witness

In his first point of error, Smith contends that the trial court erred by permitting Holcomb, the forensic interviewer, to testify concerning what the complainant had told her because she was not the outcry witness. Article 38.072 of the Texas Code of Criminal Procedure provides that a child abuse victim's statement regarding the abuse made to another person is not inadmissible hearsay if the statement describes the alleged offense, the person to whom the statement is made is at least eighteen years old, and that person is the first person to whom the child has made a statement about the offense. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2 (West Supp. 2011). Smith contends that M.M.'s mother, not Holcomb, was the proper outcry witness.

When the State called Holcomb to testify, Smith objected that she was not the proper outcry witness. The trial court sustained this objection. Later, the State reurged its proffer, arguing that Holcomb should be allowed to testify under the rule of optional completeness, Rule 107 of the Texas Rules of Evidence,[1] because

[1] Rule 107 provides:

> When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject

Smith had created a potentially misleading impression of the contents of M.M.'s interview during his counsel's cross-examination of Hilliard. The trial court allowed the testimony, clarifying that its ruling was not under article 38.072, but was under the rule of optional completeness.

On appeal, Smith challenges Holcomb's testimony only on the grounds that she was not the proper outcry witness. However, the trial court sustained that objection. To preserve an issue for appellate review, a party must make a timely and specific request, objection or motion and receive an adverse ruling. TEX. R. APP. P. 33.1(a); *see Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003). A trial court's sustaining of a defendant's objection is not an adverse ruling and preserves nothing for appeal. *See Martinez v. State*, No. 14-08-00964-CR, 2010 WL 1077845, at *2 (Tex. App.—Houston [14th Dist.] Mar. 25, 2010, no pet.) (holding nothing preserved for review when trial court sustained appellant's objection to hearsay statement of what child complainant told her mother concerning sexual assault) (citing *Geuder*, 115 S.W.3d at 13). Because the trial court sustained Smith's objection that Holcomb was not the proper outcry witness, Smith did not receive an adverse ruling and has preserved nothing for review. *See id.*; *see also Baxley v. State*, No. 05-99-00215-CR, 2001 WL 221607, at *5 (Tex.

> between the same parties may be given. "Writing or recorded statement" includes depositions.

TEX. R. EVID. 107.

App.—Dallas Mar. 7, 2001, pet. ref'd) (appellant who argued State's evidence not admissible under business records exception to hearsay rule waived complaint concerning public records exception because appellant did not argue that public records exception did not apply at trial).

We overrule Smith's first point of error.

Sufficiency of the Evidence

In his second and third points of error, Smith contends that the evidence is insufficient to support his convictions.

A. Standard of Review

Evidence is insufficient to support a conviction if considering all record evidence in the light most favorable to the verdict, a factfinder could not have rationally found that each essential element of the charged offense was proven beyond a reasonable doubt. *Gonzalez v. State*, 337 S.W.3d 473, 478 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *see Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (plurality op.); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere

"modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Gonzalez*, 337 S.W.3d at 479; *see Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 & n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750. If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *Gonzalez*, 337 S.W.3d at 479 (citing *Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982)).

An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence viewed in the light most favorable to the verdict. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (quoting *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). When the record supports conflicting inferences, an appellate court presumes that the factfinder resolved the conflicts in favor of the verdict and defers to that resolution. *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778. An appellate court likewise defers to the factfinder's evaluation of the credibility of the evidence and the weight to give the evidence. *Gonzalez*, 337 S.W.3d at 479 (citing *Williams*, 235 S.W.3d at 750).

B. Analysis

M.M. testified that Smith touched his anus and his penis. This testimony is sufficient evidence to sustain Smith's conviction. *Bryant v. State*, 340 S.W.3d 1, 14 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (holding child complainant's testimony alone is sufficient to support conviction) (citing *Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd)).

Smith's specific complaint is that he presented evidence showing inconsistencies and contradictions in M.M.'s testimony. Smith asserts, "On every matter that could be objectively and independently verified, the State's case failed." For example, Smith testified that no more than four people could fit in his car and, therefore, M.M. was mistaken or lying when he claimed that five people rode to Louisiana in his car. Concerning the touching that occurred on Valentine's Day, Smith contends that one of his friends testified that Wendy never went grocery shopping. Therefore, according to Smith, M.M. must have been lying when he testified that Smith touched his anus while Wendy was at the grocery store. Concerning the touching that occurred shortly before the forensic interview, Smith points out that M.M. testified that it occurred in their new residence, which M.M. testified never lacked power. Smith testified they spent only one night there before M.M.'s outcry and that they had no power on that night. Smith introduced an electric bill to corroborate his testimony on this point.

The factfinder determines the credibility of witnesses and the weight to give their testimony. *See Williams*, 235 S.W.3d at 750. Likewise, it is up to the factfinder to resolve conflicts in testimony. *See Clayton*, 235 S.W.3d at 778. As an appellate court, we must defer to the factfinder's determinations on these matters. *See id.*; *Williams*, 235 S.W.3d at 750. We conclude that the jury could have rationally resolved the conflicts in the testimony against Smith and could have chosen to believe M.M. rather than Smith. We therefore hold that the evidence is sufficient to support Smith's conviction.

We overrule Smith's second and third points of error.

Conclusion

We affirm the judgment of the trial court.

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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