

Affirmed and Memorandum Opinion filed June 29, 2010.



In The

Fourteenth Court of Appeals

NOS. 14-09-00144-CR & 14-09-00145-CR

NICHOLAS MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 400th District Court
Fort Bend County, Texas
Trial Court Cause Nos. 44216 & 44217**

MEMORANDUM OPINION

Appellant Nicholas Martinez appeals his convictions for two counts of aggravated sexual assault of a child, challenging the legal and factual sufficiency of the evidence to support the convictions. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Police responded to a call from the mother of Debra,¹ a ten-year-old girl, regarding Debra's allegations of sexual misconduct by appellant, Debra's step-father. Appellant lived with Debra, Debra's mother, and Debra's grandmother in the grandmother's home. At the scene, the officer spoke with Debra, Debra's mother, and the grandmother. The police collected various items from the home, including the clothes and underwear Debra wore during the incident and a garbage bag that may have been at the scene of the incident. Debra was referred to the Children's Advocacy Center for further evaluation by a forensic interviewer.

Appellant was charged in two indictments with aggravated sexual assault of a child. He pleaded "not guilty" to both indictments. The cases were consolidated for trial.

At trial, Debra testified that on the day in question, she took a garbage bag to the backyard for appellant. According to Debra, appellant grabbed the bag from Debra and instructed her to go into a playhouse in the backyard and lie down on the bag. Debra explained that she complied with appellant's instructions. Debra gave a detailed description of how appellant pulled her underwear halfway down and put his "poo-poo bug in her poo-poo"² before her grandmother intervened. Debra described appellant "moving" while his "middle part" was touching her "middle part."³ She testified that her clothing was not removed during the incident.

Debra's grandmother confirmed that on the day in question appellant asked her to send Debra to the backyard with a garbage bag. Debra's grandmother testified that she was suspicious of appellant, so she went out to the playhouse. She explained that her

¹ To protect the privacy of the child complainant in this case, we identify her by a pseudonym, Debra.

² During her testimony, Debra explained that this part of the body is to "use the restroom." Debra subsequently testified that she understood "poo-poo" and "poo-poo bug" to mean the female and male sexual organs, respectively.

³ Debra also used the term "middle part" to refer to the female and male sexual organs.

suspicious were based on a previous occasion when she caught appellant “hovering over” Debra on the couch, and characterized appellant’s behavior as “odd.” She also explained that she noticed the way appellant “watched” Debra, and it caught her attention. During her testimony, Debra’s grandmother explained that although the door to the playhouse was covered by a sheet, she was able to see through the sheet and saw appellant and Debra on the floor. Debra was lying on the ground, facing up while appellant’s head was “up and over” Debra’s. Upon noticing Debra’s grandmother, appellant jumped up and denied doing anything. Debra’s grandmother confronted appellant and informed him that he had to leave. Appellant packed his belongings and left. Debra’s grandmother later informed Debra’s mother about the events that had transpired.

Debra’s mother testified that when she first tried to talk to Debra about the incident, Debra did not tell her what happened. After their initial conversation, Debra’s mother instructed Debra to take a shower and go to bed. The next morning, Debra’s mother again questioned Debra about the previous day’s events. When asked by her mother, Debra responded affirmatively that she saw appellant’s “poo-poo bug” and that he put his “poo-poo bug in her poo-poo.” Based on this conversation, Debra’s mother notified the police.

During trial, a Sexual Assault Nurse Examiner (SANE), who had performed a sexual-assault examination on Debra, testified that she found no trauma to Debra’s sexual organs. A forensic scientist who tested Debra’s underwear testified that the tests from the underwear came back negative for bodily fluids such as blood and semen. The forensic scientist also testified that a rape kit examination performed on Debra showed no indication of fluids.

The forensic interviewer from the Children’s Advocacy Center testified that Debra described the incident with appellant during the interview. According to the forensic interviewer, Debra also told her about another incident when appellant put his “poo-poo bug” in her “booty.” Debra indicated to the interviewer that this activity occurred on a

regular basis. In her in-court testimony, Debra also gave details describing these incidents, in which appellant put his “middle part” in her “booty.”⁴ On these occasions, according to Debra, while her mother was at work in the morning hours before school, Debra would sleep on a mattress beside appellant’s bed. Debra testified that appellant would come into the room, pull Debra’s underwear down, and put his “middle part” in her “booty.” Debra described how she would be lying face down and that appellant would get on her back and “move” his “middle part” inside her “booty.” Debra testified that this activity occurred on multiple occasions.

A jury found appellant guilty of both counts of aggravated sexual assault of a child and assessed punishment at twenty-five years’ confinement for each offense, with the sentences to run consecutively.

II. ISSUES AND ANALYSIS

In two issues, appellant challenges the legal and factual sufficiency of the evidence supporting his convictions.⁵ For support, appellant points to a lack of physical and DNA evidence, Debra’s inconsistent statements of the incidents, Debra’s dislike of appellant, and Debra’s grandmother’s testimony that she did not witness any clothing removed or other signs of sexual assault.

When evaluating a challenge to the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State’s evidence or believe that appellant’s evidence outweighs the State’s evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt.

⁴ During her testimony, Debra explained that a “booty” is part of the body that is used to “poo-poo.”

⁵ Although appellant challenges the legal and factual sufficiency of the evidence in two separate issues, we review these two issues together.

Matson v. State, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury, as the trier of fact “is the sole judge of the credibility of the witnesses and of the strength of the evidence.” *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses’ testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State* 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence in a neutral light and inquire whether we are able to say, with some objective basis in the record, that a conviction is “clearly wrong” or “manifestly unjust” because the great weight and preponderance of the evidence contradicts the jury’s verdict. *Watson v. State*, 204 S.W.3d 404, 414–17 (Tex. Crim. App. 2006). It is not enough that this court harbor a subjective level of reasonable doubt to overturn a conviction that is founded on legally sufficient evidence, and this court cannot declare that a conflict in the evidence justifies a new trial simply because it disagrees with the jury’s resolution of that conflict. *Id.* at 417. If this court determines the evidence is factually insufficient, it must explain in exactly what way it perceives the conflicting evidence greatly to preponderate against conviction. *Id.* at 414–17. The reviewing court’s evaluation should not intrude upon the fact finder’s role as the sole judge of the weight and credibility given to any witness’s testimony. *See Fuentes*, 991 S.W.2d at 271. In conducting a factual-sufficiency review, we discuss the evidence appellant claims is most important in allegedly undermining the jury’s verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

A person commits the offense of aggravated sexual assault of a child if the person intentionally and knowingly (1) causes penetration of the sexual organ or anus of a child

younger than fourteen years of age, and (2) causes the sexual organ of a child younger than fourteen years of age to contact the person's sexual organ. *See* TEX. PENAL CODE ANN. §§ 22.021(a)(1)(B)(iii), (2)(B), 22.011(c)(1), (2) (Vernon Supp. 2009). Appellant was charged by two indictments with aggravated sexual assault of a child involving contact and penetration. In the first indictment, the State alleged that appellant knowingly and intentionally caused the contact and penetration of Debra's female sexual organ with his sexual organ. In the second indictment, the State alleged that appellant knowingly and intentionally caused the contact and penetration of Debra's anus with his sexual organ.

Debra testified in detail that when she was ten years old, while in the playhouse with appellant, appellant put his "poo-poo bug" in her "middle part." *See* TEX. PENAL CODE ANN. §§ 22.021(a)(1)(B)(iii), (2)(B), 22.011(c)(1), (2). Debra also described another incident when appellant put his "poo-poo bug" in her "booty" on almost a daily basis when she was between the ages of eight and ten. *See id.*

Appellant argues there is a lack of physical and DNA evidence to support Debra's claims of sexual abuse. According to appellant, the only evidence presented was Debra's uncorroborated testimony; he attests that Debra's grandmother's testimony alone is only circumstantial evidence of a sexual assault. In the case of an aggravated sexual assault, the testimony of the child victim alone is sufficient to support a conviction. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 2005); *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978); *Tran v. State*, 221 S.W.3d 79, 88 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

Appellant also asserts that none of the clothing Debra wore, the garbage bag she carried to the playhouse, or the rape kit revealed physical or DNA evidence to support Debra's allegations of a sexual assault. Physical evidence is not required when the complainant provides ample testimony to establish that the sexual assault occurred. *Garcia*, 563 S.W.2d at 928 (concluding complainant's testimony alone to be sufficient evidence of penetration); *Bargas v. State*, 252 S.W.3d 876, 889 (Tex. App.—Houston

[14th Dist.] 2008, no pet.) (concluding that medical evidence is not required when complainant provides detailed testimony sufficient to establish that the accused committed aggravated sexual assault). During trial, the SANE nurse, who examined Debra, explained that although she found no trauma to Debra's sexual organs, the absence of trauma in examinations of sexually abused child victims is common. *See Bargas*, 252 S.W.3d at 885 (involving similar testimony and concluding evidence was legally and factually sufficient to support convictions for sexual assault of a child). Additionally, the forensic scientist who performed the test on Debra's underwear testified that a lack of physical evidence could be attributed to the perpetrator being interrupted, or to the perpetrator not causing enough trauma to result in bleeding. In her in-court testimony, a detective with the Special Crimes Unit also explained that although there was no physical evidence to corroborate the allegation of sexual assault, Debra's grandmother's statement of what she observed, along with Debra's allegations (as told to Debra's mother), the testimony of the nurse and the forensic interviewer corroborated Debra's story. The garbage bag collected from the scene provided additional corroboration. During her testimony, Debra described in detail how appellant put his "poo-poo bug" in her "middle part" while she was in the playhouse with appellant. Additionally, she testified that appellant put his "poo-poo bug" in her "booty" on more than one occasion. The lack of physical or DNA evidence does not render the evidence insufficient because Debra provided ample testimony to establish appellant sexually assaulted her. *See Bargas*, 252 S.W.3d at 888.

Appellant complains generally that Debra's testimony consisted of different and inconsistent versions of the sexual assault. Appellant argues that although Debra testified that she initially told her mother "everything," that testimony conflicts with her mother's testimony in that it was not until the following day that Debra told her about the events in the playhouse. Appellant also claims that Debra's description of the events to the nurse conflicted with Debra's in-court testimony. Specifically, appellant contends Debra told the nurse that while she and appellant were in the playhouse, appellant pulled her panties to

the side and put his “thing” in her “poo-poo.”⁶ Appellant points to Debra’s testimony that, while in the playhouse, appellant pulled her underwear halfway down and put his “middle part” in her “middle part.” Appellant also complains that Debra asserted new allegations of sexual assault for the first time at trial, referring to Debra’s testimony describing several different occasions of sexual assault that were never mentioned to the nurse or Debra’s mother prior to her alleging them in court. Furthermore, appellant argues Debra “hated” appellant. It is the role of the jury to reconcile conflicts, contradictions, and inconsistencies in the evidence. *See Bargas*, 252 S.W.3d at 888; *Tran*, 221 S.W.3d at 89 (providing that inconsistent statements were not enough to render the evidence insufficient because the jury heard the inconsistent statements from two witnesses and still found the accused guilty of aggravated sexual assault). The jury heard Debra’s testimony, and as the sole judge of witness credibility, was free to believe or disbelieve any portion. *See Fuentes*, 991 S.W.2d at 271; *Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). We presume that when faced with conflicting evidence, the jury resolved the conflicts in favor of the prevailing party. *See Turro*, 867 S.W.2d at 47.

When the evidence is viewed in the light most favorable to the verdict, the jury, as the rational trier of fact, could have determined that the essential elements of the offense were met beyond a reasonable doubt. *See Bargas*, 252 S.W.3d at 889 (concluding that the evidence was legally sufficient because the jury heard the evidence and inconsistencies and still found the essential elements met beyond a reasonable doubt). Viewing all of the evidence in a neutral light, we are not able to say with some objective basis in the record that appellant’s convictions are clearly wrong or manifestly unjust because the great weight and preponderance of the evidence contradicts the jury’s verdict. *See Tran*, 221 S.W.3d at 89 (concluding that the inconsistencies and conflicting testimony were not enough to render the evidence factually insufficient because the jury heard the inconsistencies and conflicting testimony and found the accused guilty). The evidence

⁶ Debra told the nurse “thing” is “what mans have” and “poo-poo” is what “ladies have.”

presented is legally and factually sufficient to support appellant's convictions for aggravated sexual assault of a child. *See Tran*, 221 S.W.3d at 89; *Bargas*, 252 S.W.3d at 889. Accordingly, we overrule appellant's two issues.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
 Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

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