Affirmed and Memorandum Opinion filed April 27, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00327-CR, 14-09-00336-CR

TIMOTHY EDWARD SHAFFER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 249th District Court
Johnson County, Texas
Trial Court Cause Nos. F43355, F40654

MEMORANDUM OPINION

Timothy Edward Shaffer appeals his convictions for aggravated sexual assault of a child and indecency with a child (cause number F40654) and online solicitation of a minor (cause number F43355). Appellant contends the evidence is legally and factually insufficient to support his convictions. We affirm.

I. Background

The nature of the criminal allegations in this case requires a recitation of somewhat graphic facts. The complainant, D.S.,[1] and appellant first communicated with each other

[1] On appeal we will use only the complainant's initials and the initials of other juveniles involved.

online during the summer of 2004 and eventually spoke on the telephone. D.S. was living with her father at the time in North Richland Hills, Texas.

In August 2004, D.S., thirteen years old, returned to her mother's home in Cleburne, Texas, to begin the school year. Upon her return, D.S. met appellant, twenty-six years old, in person. Appellant was living with C.P., a friend of D.S.'s from school. Appellant worked for C.P.'s mother following her back surgery. After hearing of problems appellant was having at home, C.P.'s mother invited appellant to live with her and her son.

According to D.S., appellant kissed her and touched her breast during their first meeting. In subsequent meetings over the next several days, appellant had sexual intercourse with D.S. at C.P.'s residence.

D.S.'s mother began to worry that something was going on between her daughter and appellant. She asked her best friend's daughter, A.G., to go to C.P.'s residence and tell her what was going on with her daughter. Based on information she obtained, D.S.'s mother called the police. She also informed D.S. that further contact with the appellant was forbidden.

Later, during the school year, D.S. wrote a note that circulated at school. In the note, D.S. communicated to appellant that she had asked someone to kill her mother and her mother's boyfriend so she could be with appellant. D.S. was charged with attempt to solicit capital murder, spent several weeks in juvenile detention, and eventually went to live with her father in North Richland Hills after the charges were dismissed.

D.S. decided to contact appellant by telephone in the summer of 2005. That August, the two had communications over the Internet. During this time, D.S. called her mother and asked for a ring that appellant had given D.S. D.S.'s mother became concerned that her daughter was seeing appellant again and contacted D.S.'s father. D.S.'s father also became concerned and purchased software to monitor his daughter's computer use. During one of their online communications, D.S. and "Lovelyponygirl" discussed meeting the night of August 26. The plan called for "Lovelyponygirl" to park in

the driveway of a vacant house and meet D.S. at her father's residence. D.S.'s father took this information to the police, and the police set up surveillance. Appellant arrived as planned, and the police followed and arrested appellant.

The State charged appellant with three counts of sexual assault of a child, two counts of indecency with a child, two counts of online solicitation of a minor,[2] and seven counts of possession or promotion of child pornography. *See* Tex. Penal Code Ann. § § 22.021 (Vernon 2003 & Supp. 2009), 21.11 (Vernon 2003), 33.021 (Vernon Supp. 2009), 43.26 (Vernon 2003). The cause numbers were consolidated in a single trial. The State moved to dismiss the seven counts of possession or promotion of child pornography (cause number F43356), and the trial court granted the motion. A jury found appellant guilty of the remaining charges and sentenced him to 60 years' confinement in the Texas Department of Criminal Justice, Institutional Division and a $5,000 fine for each of the three counts of sexual assault of a child, 10 years' confinement and a $2,500 fine for each of the two counts of indecency with a child, and 15 years' confinement and a $5,000 fine for one count of online solicitation of a minor.

II. Standard of Review

In a legal-sufficiency review, we consider all of the evidence in the light most favorable to the jury's verdict and decide whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). 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). We may not substitute our judgment for the jury's, and we do not re-examine the weight and credibility of the evidence considered by the jury. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). 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).

[2] Prior to trial, the State abandoned one of the two counts of online solicitation of a minor.

When we review the factual sufficiency of the evidence, by contrast, we consider the evidence in a neutral light. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We must set aside the verdict if (1) the proof of guilt is so obviously weak as to render the verdict clearly wrong and manifestly unjust, or (2) the proof of guilt, while legally sufficient, is nevertheless outweighed by the great weight and preponderance of the contrary proof so as to render the verdict clearly wrong and manifestly unjust. *Roberts v. State*, 220 S.W.3d 521, 524 (Tex. Crim. App. 2007). However, because the jury is best able to evaluate the credibility of witnesses, we must afford appropriate deference to its conclusions. *Lancon v. State*, 253 S.W.3d 699, 704-05 (Tex. Crim. App. 2008). 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).

III. Discussion

A. Aggravated Sexual Assault of a Child and Indecency with a Child

In two issues, appellant contends the evidence is legally and factually insufficient to support his convictions for aggravated sexual assault of a child and indecency with a child.

1. Legal Sufficiency

Appellant argues that there was no evidence he caused the penetration of D.S.'s sexual organ with his finger. He does not challenge the legal sufficiency of the evidence to establish any other element of aggravated sexual assault of a child or any element of indecency with a child. [3]

[3] Counts one and two of the indictment alleged aggravated sexual assault of a child by digital penetration; count three alleged aggravated sexual assault of a child by D.S.'s sexual organ contacting appellant's sexual organ. Counts four and five of the indictment alleged indecency with a child by contact with D.S.'s breast. On appeal, appellant only challenges the legal sufficiency of the evidence to show he digitally penetrated D.S. To the extent that appellant may have intended to challenge the legal sufficiency of the evidence with respect to counts three, four, and five, appellant has failed to brief any such issues on appeal. *See* Tex. R. App. P. 38.1(i).

A person commits the offense of aggravated sexual assault of a child "if the person intentionally or knowingly causes the penetration of the . . . sexual organ of a child by any means" and the victim is younger than 14 years of age. Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), (2)(B) (Vernon 2003 & Supp. 2009). In counts one and two of the indictment, the State alleged appellant intentionally or knowingly caused the penetration of D.S.'s sexual organ with his finger.

Appellant contends there was no evidence that he caused the penetration of D.S.'s sexual organ with his finger. He asserts D.S. testified to fondling and sexual intercourse, but not to digital penetration. Appellant's assertion is incorrect. D.S. testified that appellant penetrated her sexual organ with his finger on more than one occasion while at C.P.'s residence during a one-and-a-half week period in August 2004. In sexual abuse cases, the testimony of the child victim alone is sufficient to support the conviction. Tex. Code Crim. Proc. Ann. art. 38.07(a), (b)(1) (Vernon 2005); *Tran v. State*, 221 S.W.3d 79, 88 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). Therefore, the evidence is legally sufficient to support appellant's conviction for the two counts of aggravated sexual assault of a child that alleged digital penetration.

2. Factual Sufficiency

Appellant next contends the evidence is factually insufficient to support his convictions for aggravated sexual assault of a child and indecency with a child by contact. In support of his factual-insufficiency argument, appellant contends (1) witnesses never stated they saw appellant place his finger in D.S.'s sexual organ; (2) D.S. did not testify to digital penetration; (3) contrary evidence showed appellant had piercings on his penis and, because of the piercings, any sexual intercourse would have caused physical damage to D.S.; and (4) one of the State's witnesses, A.B., could not identify appellant in the courtroom.[4]

[4] A.B. identified appellant from a picture of how he appeared in August 2004, but could not identify him in court.

D.S. testified that appellant penetrated her sexual organ with his finger on more than one occasion while at C.P.'s residence during a one-and-a-half week period in August 2004. Appellant does not state how appellant's piercings or A.B.'s inability to identify appellant in court contradicted this evidence of digital penetration. Viewing the evidence in a neutral light, the evidence is not so obviously weak as to render the verdict clearly wrong and manifestly unjust. Likewise, the proof of guilt is not outweighed by the great weight and preponderance of the contrary proof so as to render the verdict clearly wrong and manifestly unjust. Therefore, the evidence is factually sufficient to support appellant's conviction for the two counts of aggravated sexual assault of a child that alleged digital penetration.

To the extent appellant is attempting to challenge the factual sufficiency of the evidence to prove the aggravated sexual assault of a child charge in count three of the indictment or to prove the indecency with a child charges in counts four and five of the indictment, appellant's argument is without merit.

A person commits the offense of aggravated sexual assault of a child "if the person intentionally or knowingly causes the penetration of the . . . sexual organ of a child by any means" and the victim is younger than 14 years of age. Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), (2)(B) (Vernon 2003 & Supp. 2009). In count three of the indictment, the State alleged appellant intentionally or knowingly caused the penetration of D.S.'s sexual organ with his sexual organ.

A person commits the offense of indecency with a child "if, with a child younger than 17 years of age . . . the person engages in sexual contact with the child . . . ." *Id.* § 21.11(a)(1) (Vernon 2003 Supp. 2009).[5] "Sexual contact," as it applies in this case, means any touching by a person of the breast, committed with the intent to arouse or gratify the sexual desire of any person. *Id.* § 21.11(c)(1).

[5] In 2009, the legislature removed the requirement that the child must not be the person's spouse. Act of Sept. 1, 2009, 81st Leg., R.S., ch. 260, § 1, 2009 Tex. Gen. Laws 710. In this case, D.S. testified that she was not appellant's spouse.

D.S. testified that appellant had sexual intercourse with her and touched her breast on more than one occasion at C.P.'s residence during a one-and-a-half week period in August 2004. The testimony of the child victim alone is sufficient to support a conviction under chapter 21, section 22.011, or section 22.021. Tex. Code Crim. Proc. Ann. art. 38.07 (a), (b)(1). A.B. also testified that D.S. and appellant went into a room alone at C.P.'s residence and A.B. heard moaning and things being moved around. She stated that when appellant came out of the room, he was putting his shirt back on and then made comments to D.S. to "tell him next time that she started her period" and asked A.B. to smell his beard because "[D.S.] tasted real good." In addition, C.P. testified that he saw appellant touch D.S.'s "breast area" at C.P.'s residence. A.G. testified that, while at C.P.'s residence, she saw appellant grab D.S.'s breast as he was talking about putting lotion on her breasts. The specific intent required for the offense of indecency with a child may be inferred from a defendant's conduct, his remarks, and all of the surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981) (panel op.).

With regard to testimony about appellant's piercings and A.B.'s inability to identify appellant in court, the jury is the sole judge of the weight and credibility of witness testimony. *Lancon*, 253 S.W.3d at 707. The jury may choose to believe some testimony and disbelieve other testimony. *Id.* Here, the jury chose to believe the testimony that appellant had sexual intercourse with D.S. and touched her breast.

Viewing the evidence in a neutral light, the evidence is not so obviously weak as to render the verdict clearly wrong and manifestly unjust nor is the proof of guilt outweighed by the great weight and preponderance of contrary proof.

Accordingly, we overrule appellant's first and second issues in his appeal from his convictions in cause number F40654.

B. Online Solicitation of a Minor

In a separate brief, appellant contends the evidence is legally and factually insufficient to support his conviction for online solicitation of a minor. Specifically, appellant argues that there is no evidence he was the person who solicited D.S.[6]

1. Legal Sufficiency

As it applies to this case, a person commits the offense of online solicitation of a minor "if the person . . . through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in . . . deviate sexual intercourse with the actor . . . ." Tex. Penal Code Ann. § 33.021(c) (Vernon Supp. 2009). Deviate sexual intercourse is defined as "any contact between any part of the genitals of one person and the mouth or anus of the other person." Tex. Penal Code Ann. § 21.01(1)(A) (Vernon 2003).

D.S. testified that she and appellant had communications on AOL Instant Messenger in August 2005. She stated that appellant used the screen name "Lovelyponygirl." The record reflects a sexually explicit dialogue between the screen name D.S. testified to using[7] and "Lovelyponygirl" on August 25, 2005. D.S. and "Lovelyponygirl" also discussed via instant messenger meeting in person the night of August 26, 2005, to watch a movie and have sexual intercourse, including remarks by "Lovelyponygirl" that he wanted to place his penis in D.S.'s anus. D.S. testified that the movie they were going to watch was "Charlie and the Chocolate Factory." The discussion included a detailed description of where "Lovelyponygirl" should park his car, namely in the driveway of a green and white vacant house on Simmons Street.

---

[6] While appellant's "Summary of the Argument" under his legal and factual sufficiency issues states generally that the essential elements of online solicitation of a minor were not met beyond a reasonable doubt, appellant does not challenge the sufficiency of the evidence to prove the other elements of the offense in his argument.

[7] Although D.S.'s screen name was not concealed at trial, given the nature of the case, on appeal we will not use her screen name.

Detective Wayne Goodman testified that on the night of August 26, 2005, he saw a white pick-up truck park in the driveway of a vacant house, as described in the messages between D.S. and "Lovelyponygirl," and he observed a man exit the vehicle and walk to D.S.'s residence. The police went to the residence and arrested appellant. A bag was found in D.S.'s bedroom that contained the movie "Willie Wonka and the Chocolate Factory," an unopened condom, and a bottle of massage oil. Detective Goodman testified that the bag belonged to appellant.

In addition, the August 25, 2005 dialogue included a discussion about D.S. sending sexually graphic photographs of herself to "Lovelyponygirl." Officer James Hollingsworth, a criminal investigator assigned to the Computer Crimes Unit at the Tarrant County District Attorney's Office, analyzed a computer taken from D.S.'s father's residence in North Richland Hills. He testified that he found seven sexually graphic images on the hard drive and "Lovelyponygirl" on the AOL buddy list.

Hollingsworth also analyzed an external hard drive and computer taken from C.P.'s residence. He testified that he found two folders labeled "Lovelyponygirl," D.S.'s screen name on the AOL buddy list, and the same sexually graphic photographs. On the external hard drive, he found pieces of text with the email address used by appellant.

The testimony showed that C.P., his mother, and appellant lived at C.P.'s residence and everyone had access to the computer in the computer room. C.P. denied that he was "Lovelyponygirl" during his testimony. Detective Goodman testified that the dialogue between "Lovelyponygirl" and D.S. indicated "Lovelyponygirl" was a male.

When viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found that appellant was the one who, through a commercial online service, knowingly solicited D.S. to meet him with the intent that she would engage in deviate sexual intercourse with him.

2. Factual Sufficiency

Appellant next contends the evidence is factually insufficient to support his conviction for online solicitation of a minor. In support of his factual-insufficiency argument, appellant contends (1) no evidence was presented that appellant was the one who made the online solicitation; (2) no testimony proved that appellant or D.S. had access to computers with Internet service;[8] (3) there was evidence that multiple people had access and, in fact, used the computers seized by law enforcement; and (4) D.S. admitted that, at times, she thought she was talking to one person online only to realize it was someone else.

As discussed under the legal-sufficiency analysis, there was evidence that appellant was the one who, through a commercial online service, knowingly solicited D.S. to meet him with the intent D.S. would engage in deviate sexual intercourse with him. C.P. and C.P.'s mother testified that appellant had access to the computer in the computer room at C.P.'s residence; C.P.'s mother testified that the computer had Internet service. D.S. testified that when she first began communicating online with appellant in the summer of 2004, she initially thought she was communicating with C.P.; however, D.S. testified that it was appellant with whom she was communicating online on August 25, 2005, which was the communication that gave rise to the charge for online solicitation of a minor. Specifically, D.S. testified that the sexually explicit dialogue between her screen name and "Lovelyponygirl" on August 25 via AOL Instant Messenger was a dialogue between her and appellant.

While testimony that several people had access to the computer at C.P.'s residence may have suggested that someone else could have used the computer to contact D.S., there was no evidence presented to suggest that is what actually happened. *Lewis v. State*, 193 S.W.3d 137, 142 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (evidence of theft not

[8] Detective Goodman testified that the only computer with Internet access at the North Richland Hills home was located in D.S.'s father's bedroom when Goodman visited the home on August 8. However, Goodman stated that the same computer with Internet access was found in D.S.'s bedroom on the night of August 26, 2005, when the police arrested appellant.

factually insufficient when testimony indicated someone else *could* have used computer but no evidence that is what actually happened). The jury is the sole judge of a witness's credibility and the weight to be given the testimony. *Lancon*, 253 S.W.3d at 707. The jury may choose to believe some testimony and disbelieve other testimony. *Id*. Here, the jury chose to believe D.S.'s testimony that it was appellant with whom she was communicating via AOL Instant Messenger on August 25.

Viewing the evidence in a neutral light, the evidence is not so obviously weak as to render the verdict clearly wrong and manifestly unjust nor is the proof of guilt outweighed by the great weight and preponderance of contrary proof.

Accordingly, we overrule appellant's first and second issues in his appeal from his conviction in cause number F43355.

III. Conclusion

Having overruled appellant's issues, we affirm the judgments of the trial court.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
Do Not Publish — TEX. R. APP. P. 47.2(b).