Affirmed and Memorandum Opinion filed August 31, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00430-CR

JOSE AVITUA SOTO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1141678

MEMORANDUM OPINION

Following a jury trial, appellant Jose Avitua Soto was convicted of indecency with a child and sentenced to imprisonment for a period of ten years and one day. In a single issue, appellant contends that the evidence is factually insufficient to sustain his conviction. We affirm.

On the evening of December 11, 2006, nine year old Z.G. was walking through her apartment complex when she was approached by appellant. According to Z.G., appellant

held out his arms to block her path, then pointed to her genitalia and asked "What is that?" or "What is this?" Z.G. became frightened and responded, "No, no, no." Appellant then put his hand underneath Z.G.'s shorts and underwear and touched the outside of her vagina with his finger. Z.G. managed to get away from appellant and ran back to her apartment, where she told her grandmother, Wanda Harris, that a man had touched her vagina. Harris then called the police.

Officer Angel Silva responded to Harris's 911 call. Z.G. described appellant's appearance to Officer Silva and provided the apartment number where she believed appellant lived. Officer Silva went to that apartment to try to speak with appellant. Appellant was not home at the time, so Officer Silva left the complex and began writing a police report. A short time later, Officer Silva returned to the complex after being notified that appellant had called the police. Appellant met Officer Silva and stated that appellant's roommate told appellant that the police were looking for him. Apellant said he was worried about the allegations made against him. Appellant also told Officer Silva that Z.G. ran up to him while he was walking through the complex's courtyard that evening and asked if she could have some money to buy crayons and a coloring book. Appellant told her that he would give her some money but, as he reached for his pocket, his left knee gave out. Appellant reached for a brick wall to steady himself and recalled his elbow brushing against Z.G.'s body. This contact startled Z.G., who immediately ran away from appellant.

After Officer Silva spoke with appellant, the complaint was transferred to the Houston Police Department's juvenile sexual crimes division. Several months later, Z.G. picked appellant's photograph out of a photo array and identified appellant as the man who touched her genitals. Appellant was subsequently indicted for indecency with a child. In

his sole issue on appeal, appellant contends the evidence is factually insufficient to support his conviction.[1]

When conducting a factual sufficiency review, we view all the evidence in a neutral light and will set aside the verdict only if we are able to say, with some objective basis in the record, that the 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). We cannot declare that a new trial is justified because we disagree with the jury's resolution of a conflict in the evidence, and we will not intrude upon the fact-finder's role as the sole judge of the weight and credibility of witness testimony. *See id.* at 417; *Fuentes v. State*, 991 S.W.2d 267, 271–72 (Tex. Crim. App. 1999). The jury may choose to believe all, some, or none of the testimony presented. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *In re A.B.*, 133 S.W.3d 869, 872 (Tex App.—Dallas 2004, no pet.). In our 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). If we determine the evidence is factually insufficient, we must explain in exactly what way we perceive the conflicting evidence to greatly preponderate against conviction. *Watson*, 204 S.W.3d at 414–17.

A person commits the offense of indecency with a child if the person engages in sexual contact with a child younger than seventeen years of age. TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon Supp. 2009). Sexual contact means any touching of the anus, breast, or any part of the genitals of the child, if the act is committed with the intent to arouse or to gratify the sexual desire of any person. *Id.* § 21.11(c)(1).

[1] A factual sufficiency review begins with the presumption that the evidence supporting the jury's verdict is legally sufficient. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). By challenging only the factual sufficiency of the evidence, appellant "effectively concedes the evidence is legally sufficient to sustain the conviction." *Newby v. State*, 252 S.W.3d 431, 435 n.1 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

Appellant argues the evidence is factually insufficient because his behavior and actions do not suggest his contact with Z.G. was made with the intent to arouse or gratify the sexual desire of any person. An individual acts with intent when it is the individual's conscious desire or objective to engage in the conduct or cause the result. *Id.* § 6.03(a) (Vernon 2003). Intent is generally a question for the jury. *Reed v. State*, 158 S.W.3d 44, 48 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). The specific intent to arouse or gratify the sexual desire of any person can be inferred from the defendant's conduct, his remarks, and all the surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. [Panel Op.] 1981); *McDonald v. State*, 148 S.W.3d 598, 600 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 179 S.W.3d 571 (Tex. Crim. App. 2005). An oral expression of intent is not required; conduct itself may be sufficient to infer intent. *See Navarro v. State*, 241 S.W.3d 77, 79 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *Villanueva v. State*, 209 S.W.3d 239, 246 (Tex. App.—Waco 2006, no pet.).

Here, appellant's intent to arouse or gratify the sexual desire of any person can be inferred from Z.G.'s testimony that appellant blocked her path, pointed to and asked about her genitalia, and touched her vagina after reaching under her shorts and underwear. *See Connell v. State*, 233 S.W.3d 460, 467 (Tex. App.—Fort Worth 2007, no pet.) (finding appellant's intent to arouse and gratify sexual desire where appellant touched complainant's genitals and anus during "massages"); *Gottlich v. State*, 822 S.W.2d 734, 741 (Tex. App.—Fort Worth 1992, pet ref'd) (finding testimony of complainant that appellant placed his hand inside her underwear and touched her genitals was sufficient for jury to infer element of intent to arouse or gratify sexual desire), *abrogated on other grounds by Arevalo v. State*, 943 S.W.2d 887, 888–90 (Tex. Crim. App. 1997); *see also, e.g., McDonald*, 148 S.W.3d at 600 (intent to arouse or gratify sexual desire can be inferred from the accused's conduct and remarks, as well as the surrounding circumstances). The testimony of a child victim, standing alone, is sufficient evidence to support appellant's conviction for indecency with a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07

(Vernon 2005); *Sansom v. State*, 292 S.W.3d 112, 122–23 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (mem. op.); *Navarro*, 241 S.W.3d at 81.

Appellant contends that several factors in this case support an inference that he "did *not* intend to derive any sexual gratification from his accidental contact with [Z.G.]" In support of this contention, appellant points to the testimony of an assistant manager at his apartment complex, who indicated that appellant walked with a "fairly bad limp." Appellant argues this evidence supports his statement to Officer Silva that his knee simply gave out, causing him to brush against Z.G. while falling. Appellant also points to his behavior after the incident in cooperating with police, not attempting to contact Z.G. in order to persuade her to change her story, and not moving away from the apartment complex. Appellant further argues that Z.G.'s testimony lacks credibility because she stated that she had only seen him once prior to the incident, while other evidence indicated that appellant had approached Harris multiple times in Z.G.'s presence in an effort to strike up a relationship with Harris. Through these arguments, appellant is essentially challenging the weight and credibility of the testimony at trial. The weight to give any contradictory or inconsistent testimonial evidence is within the sole province of the jury, as these determinations turn on an evaluation of witness credibility and demeanor. *See Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008); *Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). A reviewing court may only disagree with the jury's resolution of conflicting or inconsistent evidence when necessary to prevent manifest injustice. *See Wootton v. State*, 132 S.W.3d 80, 88 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). A jury's decision is not manifestly unjust simply because the jury resolved evidentiary conflicts in favor of the State. *Id.* (citing *Cain*, 958 S.W.2d at 410).

Viewing all the evidence in a neutral light, we do not find that the jury's verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, nor is the verdict against the great weight and preponderance of the evidence. Accordingly, the evidence is factually sufficient to support appellant's conviction. *See Watson*, 204

S.W.3d at 417. We overrule appellant's sole issue and affirm the judgment of the trial court.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.
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