

Affirmed and Memorandum Opinion filed August 5, 2010.



In The

**Fourteenth Court of Appeals**

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NO. 14-09-00622-CR

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**GILBERT RAY CASTILLO, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 176th District Court  
Harris County, Texas  
Trial Court Cause No. 1152980**

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**M E M O R A N D U M   O P I N I O N**

Appellant was sentenced to 30 years confinement for his conviction of indecency with a child. In two issues, appellant contends that the evidence is factually insufficient to support his conviction. We affirm.

**BACKGROUND**

In early 2008, the complainant, NAC, made an outcry of inappropriate touching to her grandmother. NAC told her grandmother that while she, NAC, was sleeping at her father's house, someone picked her up from the couch on which she was sleeping, told her she was pretty, and unzipped her pants. As NAC made the outcry to her

grandmother, she wept, almost uncontrollably, and was unable to finish the account. The grandmother told NAC's mother, Crystal Arriaga, who in turn called Child Protective Services.

Claudia Mullin, a forensic interviewer for the Harris County Children's Assessment Center ("CAC"), interviewed NAC, her mother, and grandmother. NAC was seven years old at the time. NAC initially denied any inappropriate touching or abuse. However, when Mullin asked NAC about her grandmother, NAC seemed anxious to talk with Mullin. NAC gradually recounted her previous outcry, with more details, to Mullin. NAC told Mullin that NAC's uncle, her father's brother, had inappropriately touched her while she was visiting her father at Christmastime. NAC indicated that she had fallen asleep on a couch in the living room. In the middle of the night, appellant picked up NAC from the couch and carried her to one of the bedrooms. As appellant carried NAC to the bedroom, NAC woke up. Appellant unbuttoned NAC's pants and touched her vaginal area and squeezed her anus, outside the clothing. NAC's father and step-mother were asleep in an adjacent bedroom during the incident.

After the CAC interviews, Officer Albert Galvan of the Pasadena Police Department began to investigate NAC's allegations. Because NAC indicated that her uncle was the perpetrator, Office Galvan first investigated the brother of NAC's father. After using a photo spread that included the father's brother, Officer Galvan ruled the brother out as the perpetrator. Officer Galvan's investigation soon revealed that NAC and her sister, AC, referred to appellant, the father's cousin, as "uncle." Officer Galvan then generated a photo spread with appellant; NAC identified appellant as her uncle and the perpetrator. Based on the forensic interviews and NAC's photo spread identification of appellant, Officer Galvan concluded that appellant was the perpetrator.

Appellant was charged by indictment with indecency with a child by touching. The indictment also contained two enhancement allegations for purposes of punishment.

Appellant pleaded true to the enhancement allegations, but pleaded not guilty to the indecency charge. He also elected for a jury determination on guilt or innocence.

At trial, the grandmother and Mullin recounted NAC's outcry. Officer Galvan testified regarding his investigation into the allegations. NAC testified that her uncle touched her vaginal area and anus while she was visiting her father during the Christmas holiday. Specifically, NAC testified that she and her sister fell asleep on the couch in the living room. But later that night, appellant carried NAC to the bedroom. The next morning, NAC woke up in the bedroom. Appellant started kissing her. He touched NAC on her back, "bottom," "front part," and hip. Appellant also squeezed NAC's anus. Appellant unbuttoned NAC's shorts. NAC buttoned her shorts back and then left the bedroom. NAC testified that she was unsure of appellant's exact relationship with her father but identified appellant in court as the perpetrator.

Appellant and NAC's father testified for the defense. NAC's father testified that in his opinion, NAC had fabricated the allegations. Appellant denied the allegations. The jury ultimately found appellant guilty of the charged offense. His punishment, enhanced by two prior felony convictions, was assessed at 30 years in prison. In two issues, appellant contends that the evidence is factually insufficient to support the jury's verdict.

### **FACTUAL SUFFICIENCY<sup>1</sup>**

In a factual sufficiency review, we review all the evidence in a neutral light, favoring neither party. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We then ask (1) whether the evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the jury's verdict seems clearly wrong and manifestly unjust, or (2) whether, considering the conflicting evidence, the jury's verdict

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<sup>1</sup> Because a factual sufficiency review begins with the presumption that the evidence supporting the jury's verdict is legally sufficient, and because appellant challenges only the factual sufficiency of the evidence, appellant effectively concedes the evidence is legally sufficient to sustain his conviction. See *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); *Newby v. State*, 252 S.W.3d 431, 435 n.1 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

is against the great weight and preponderance of the evidence. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006); *Watson*, 204 S.W.3d at 414–17. We cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury’s resolution of that conflict. *Watson*, 204 S.W.3d at 417. If an appellate court determines that 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; *Rivera-Reyes v. State*, 252 S.W.3d 781, 784 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The reviewing court’s evaluation should not intrude upon the factfinder’s role as the sole judge of the weight and credibility given to any witness’s testimony. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000).

A person commits indecency with a child if he engages in sexual contact with a child younger than 17 years of age who is not that person’s spouse. Tex. Penal Code Ann. § 21.11(a)(1), (b)(1), (b-1). (Vernon Supp. 2009). Sexual contact is “any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child.” *Id.* § 21.11(c)(1). The uncorroborated testimony of a child victim alone is sufficient to support a conviction for indecency with a child. Code Crim. Proc. Ann. art. 38.07 (Vernon 2005).

At trial, NAC testified that appellant touched her anus and vaginal area over her clothes while visiting her father around Christmas. In the recorded interview with Mullin, which was played during the guilt-innocence proceeding, NAC further described appellant’s inappropriate contact with her anus and vaginal area. Thus, NAC’s testimony alone was sufficient to support appellant’s conviction. *See id.* Nevertheless, appellant claims that the evidence is factually insufficient because: (1) NAC’s identification of appellant was not credible, and NAC had motive to lie; (2) NAC’s interview statements were general—lacking specificity of the incident—and confusing; and (3) NAC’s version of how the contact occurred was not plausible.

With respect to identification, appellant contends that NAC did not identify him as the perpetrator during the interview with Mullin. Appellant is correct that NAC did not identify appellant by name or proper familial status—her father’s cousin. However, Mullin testified that it was common for a child of NAC’s age to not have a firm understanding of familial relationships. Moreover, NAC and her sister customarily referred to appellant as their uncle, not their father’s cousin. More importantly, NAC identified appellant in a photo spread and at trial as the person who made the inappropriate contact. Any determinations of credibility or reconciliation of conflicts in the evidence regarding identification were reserved for the jury. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999); *see also Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

Appellant additionally contends that the family turmoil surrounding the divorce of NAC’s parents was evidence of motive and bias. In contrast, Detective Galvan testified that he detected no motive in his investigation into the indecency allegations. Despite appellant’s encouragement, we will not reweigh the credibility of these witnesses. The jury was the ultimate judge of their credibility. *See Fuentes*, 991 S.W.2d at 271; *see also Bargas v. State*, 252 S.W.3d 876, 888 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Apparently, the jury chose to believe NAC and Detective Galvan, and we must give due deference to the jury’s credibility determinations. *See Lancon*, 253 S.W.3d at 705 (concluding that the jury is in the best position to evaluate the witnesses’ credibility and to weigh the evidence). And while there were some inconsistencies in NAC’s recorded statement and her trial testimony—the touching occurred at night, in one statement, and in the morning, in the other statement—the jury was free to accept one version of the facts and to reject another, or to reject any part of NAC’s statements. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998) (stating that reconciliation of any conflicts in the evidence is within the exclusive province of the jury); *see also Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). The jury’s verdict in this case was not manifestly unjust merely because it resolved conflicting views of the evidence in

favor of the State. *See Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). We cannot order a new trial simply because there were conflicts in the State’s evidence; such conflicts call for reversal only if there was insufficient testimony to support the conviction. *See Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000).

Appellant also claims that NAC’s version was not plausible because the room in which the inappropriate contact occurred was adjacent to a room occupied by NAC’s father and step-mother. However, appellant does not explain how the father’s close proximity to the room in which the contact occurred rendered NAC’s account implausible.

After reviewing all of the evidence in a neutral light, we cannot conclude that appellant’s indecency with a child conviction is clearly wrong or manifestly unjust or that the great weight and preponderance of the evidence contradicts the jury’s verdict. Accordingly, we overrule both of appellant sufficiency points and affirm the trial court’s judgment.

/s/ Adele Hedges  
Chief Justice

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

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