NO. 07-05-0438-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL B

JUNE 7, 2007

CESAR RAY GUTIERREZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

FROM THE 69TH DISTRICT COURT OF MOORE COUNTY;

NO. 3692; HON. RON ENNS, PRESIDING

Memorandum Opinion

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Cesar Ray Gutierrez (appellant) appeals his conviction on two counts of aggravated sexual assault and two counts of indecency with a child.[1] Four of his five issues involve whether the trial court erred in 1) identifying the proper outcry witness, 2) admitting statements made by the complainant in violation of the hearsay rule, 3) refusing an

[1]Appellant was charged with aggravated sexual assault by causing the penetration of the complainant's mouth by appellant's sexual organ and by causing the penetration of the sexual organ of the complainant by appellant's sexual organ or by an object or objects unknown. Appellant was charged with indecency with a child by touching the genitals and the breast of the complainant.

instruction on the supposedly lesser-included offense of assault, and 4) admitting a pen packet into evidence. He also attacks the convictions by questioning whether the evidence supporting them was legally and factually sufficient. We overrule each contention and affirm the judgments.

Issues 1 and 2 - Outcry Witness and Hearsay

In his first two issues, appellant complains that the trial court erred in determining that April Leming, an interviewer at the Bridge,[2] was a proper outcry witness and also erred in allowing both Detective Tom Flood and Leming to testify as outcry witnesses in violation of the hearsay rule. He believes that only Flood should have been allowed to speak. We overrule the issues.

Assuming *arguendo* that the trial court erred in designating both Flood and Leming outcry witnesses, we find the act harmless. This is so because testimony akin to theirs was admitted via the sexual assault trauma nurse. The latter had examined the victim for signs of trauma, and while doing so, the victim informed her of the acts committed by appellant. The disclosure included references to appellant manipulating her breasts, placing an object in her vagina, and placing his penis in her mouth. This testimony is no less redundant or bolstering than that of Flood or Leming; yet, he does not complain about it here. Nor can we ignore the fact that appellant himself offered the "Bridge" tape into evidence, which tape contained the actual interview between the victim and Leming.

So, what we have before us are four different avenues through which evidence establishing the same facts came before the jury. Moreover, appellant complains about

[2]The Bridge is a child advocacy center.

only one of those four avenues. Given this we cannot but find the purported error harmless. *See Broderick v. State,* 35 S.W.3d 67, 74-75 (Tex. App.–Texarkana 2000, pet. ref'd) (involving hearsay and outcry and holding that when the same evidence comes in elsewhere without objection no harm arises).

Issue 3 - Instruction on Lesser-Included Offense

Next, appellant complains of the trial court's failure to charge the jury on the allegedly lesser-included offense of assault. He believed he was entitled to it because the child victim suffered damage (a tear) to her hymen and felt pain. We overrule the issue.

To be entitled to an instruction on a lesser-included offense, the elements of the offense must be included within the proof necessary to establish the offense charged, and some evidence must exist that would permit a rational jury to find that if the defendant is guilty, he is guilty only of the lesser offense. *Rousseau v. State,* 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993). It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. *Bignall v. State,* 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). Rather, there must be some evidence directly germane to the lesser offense, that is, there must be evidence affirmatively showing that appellant committed only the lesser offense. *Id.*

Here, appellant cites us to no evidence of record that purports to affirmatively negate or rebut an element of the greater offense.[3] Rather, he simply suggests that because the jury could have disbelieved aspects of the child's testimony, that entitled him

[3]This is what causes the situation before us to differ from that in *Valdez v. State*, 993 S.W.2d 340 (Tex. App.–El Paso 1999, pet. ref'd), a case upon which appellant heavily relies. In *Valdez,* there was evidence directly negating an element of the greater crime, and it came via the testimony of the alleged victim.

to the instruction. Such an argument contravenes what we were told in *Bignall*; again, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. *Bignall v. State,* 887 S.W.2d at 24.

In short, we find no evidence indicating that if appellant was guilty, it was only of assault. Thus, the prerequisites for obtaining the instruction went unsatisfied.

Issue 4 - Sufficiency of the Evidence

Appellant asserts in his fourth issue that the evidence is legally and factually insufficient to sustain the verdict for aggravated sexual assault. We disagree and overrule the issue.

The standards by which we review the sufficiency of the evidence are well established. We refer the parties to *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), *Watson v. State,* 204 S.W.3d 404 (Tex. Crim. App. 2006), and *King v. State,* 29 S.W.3d 556 (Tex. Crim. App. 2000) for their discussion. Furthermore, appellant believes the evidence is insufficient because the only direct evidence of his guilt came from the child victim, and she gave inconsistent stories.

According to the complainant, appellant fondled her breasts and genitals, forced her to perform oral sex on him, and penetrated her female sexual organ with some object which caused her pain and to bleed. Other evidence illustrated that she suffered a one centimeter tear to her hymen, which tear had to be caused by some type of penetration. This alone is some evidence upon which a rational jury could conclude beyond all reasonable doubt that appellant committed the crimes for which he was convicted. Indeed, the testimony of the victim alone, even if a child, is sufficient to support conviction if the jury

opts to believe it. *Tear v. State,* 74 S.W.3d 555, 560 (Tex. App.–Dallas 2002, pet. ref'd); *Ruiz v. State,* 891 S.W.2d 302, 304 (Tex. App.–San Antonio 1994, pet. ref'd). Finally, any conflicts or discrepancies in what the victim said were for the jury to resolve, and we do not find those conflicts were so great as to undermine our confidence in the verdict.

Issue 5 - Pen Packet

In his last issue, appellant argues that the trial court erred in admitting a pen packet because the State failed to offer it as a business record and file it with the clerk at least 14 days prior to trial. This complaint differs from that raised below, however. There, he objected to the pen packet because he allegedly had not been properly identified as the person made the subject of the packet. By raising an objection on appeal that fails to comport with the one at trial, appellant failed to preserve the alleged error. *Wilson v. State,* 71 S.W.3d 346, 349 (Tex. Crim. App. 2002).

Accordingly, the judgments of the trial court are affirmed.

Brian Quinn
Chief Justice

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