In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00312-CR
No. 07-16-00313-CR
No. 07-16-00314-CR

LARRY JOE WOODY, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 47th District Court
Potter County, Texas
Trial Court No. 69,637-A; Honorable Dan L. Schaap, Presiding

July 23, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Appellant, Larry Joe Woody, was convicted by the trial court of three counts of aggravated sexual assault of a child[1] enhanced by a prior felony conviction[2] and was

[1] *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B), (2)(B) (West Supp. 2017). An offense under this section is a first degree felony. *See id.* at § 22.021(e).

[2] *See* TEX. PENAL CODE ANN. § 12.42(c)(1) (West Supp. 2017). The trial court found one of two enhancements true. The enhancement raised the minimum period of incarceration to fifteen years.

sentenced to fifty years confinement, with the three sentences running concurrently. The trial court entered three separate judgments—one pertaining to each count. On appeal, Appellant raises two issues, i.e., (1) the evidence of aggravated sexual assault is legally insufficient as to Count Three (Number 07-16-00314-CR)[3] and (2) because a bench trial was conducted, a "jury fee" in the *Bill of Costs* was improper as to Count One (Number 07-16-00312-CR). Appellant makes no challenges as to Count Two (Number 07-16-00313-CR). We modify the *Bill of Costs* in the trial court cause Number 69,637-A Count One (Number 07-16-00312-CR) to strike the "jury fee" and affirm the judgments of the trial court, as modified.

BACKGROUND

In April 2015, an indictment was filed alleging that Appellant had intentionally or knowingly caused the penetration of the anus of D.B.,[4] a child younger than 14 years of age, by Appellant's sexual organ or finger (Count One), caused D.B.'s mouth to contact Appellant's sexual organ (Count Two), and caused his mouth to contact D.B.'s sexual organ (Count Three). The indictment also contained two enhancement paragraphs. Paragraph one alleged Appellant was finally convicted of the felony offense of possession controlled substance in November 1985 and paragraph two alleged that, after the conviction in paragraph one became final, Appellant was finally convicted of the offense of aggravated robbery, enhanced, in October 1990.

In July 2016, Appellant filed a motion requesting the State to identify persons it intended to call as outcry witnesses along with a written summary of their hearsay

[3] In his brief, counsel concedes the evidence is sufficient in Numbers 07-16-00312-CR and 07-16-00313-CR.

[4] To protect the privacy of the minor child, we refer to him by his initials.

statements, at least fourteen days before trial pursuant to article 38.072(2)(b)(1) of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072(2)(b)(1) (West Supp. 2017). On August 4, eleven days before trial, the State filed its notice of intent to use D.B.'s outcry statements made to his mother and McKenzie Price (a forensic interviewer) during a videotaped interview at the Bridge, a child advocacy center. Prior to trial, Appellant's counsel questioned whether the State's disclosure was timely, and the trial court indicated it would rule on the objection prior to Price's testimony. During its opening statement, the State indicated there would be evidence disclosed by D.B. to Price during the videotaped interview that Appellant performed oral sex on him and caused him to perform oral sex on Appellant. D.B.'s statements during the Bridge interview would be the State's only evidence that Appellant performed oral sex on D.B.

At trial, the State's evidence established that on the evening of October 10, 2014, Appellant came to the residence of the victim's mother. D.B.'s mother, her boyfriend, his sister, and D.B., then age eight, were living at the residence. D.B.'s mother, her boyfriend, and Appellant began drinking together. Later that night, Appellant was intoxicated and asked if he could spend the night. The mother and boyfriend agreed, and Appellant was given the spare bedroom. The mother and boyfriend slept in the living room. D.B. and his sister slept in another bedroom. The sister later joined her mother and boyfriend in the living room.

In the early morning hours, the mother and boyfriend were awakened by screams coming from the spare bedroom. D.B.'s mother arrived to find D.B. on the floor covered with a blanket. When she removed the blanket, she discovered Appellant lying naked on her naked son's back. Appellant grabbed his clothes, ran from the house, and drove away in his car. The police were called, and they arrived shortly.

D.B.'s mother, the State's first outcry witness, testified that D.B. told her that Appellant "stuck his thing in his butt." Later, outside the presence of the jury, the parties discussed the admissibility of a second outcry witness, Price, and D.B.'s videotaped interview. During the admissibility hearing, the trial court was satisfied that given the indictment's allegations, there could be more than one outcry witness, i.e., that the tape-recorded interview was admissible as a separate outcry statement. Regarding Appellant's objection that the State's notice of a second outcry witness was untimely, the trial court withheld its ruling until Price was called as a witness. During argument, the State asserted that it was impossible for Appellant to show any "harm" from the untimely filing because Appellant had access to the State's outcry witnesses and the interview for more than a year. The State's notice, on the other hand, was late by three days.

At trial, D.B. testified that Appellant put his finger up his butt, put his sexual organ in his butt, and caused him to perform oral sex on Appellant. D.B. denied that Appellant performed oral sex on him. During cross-examination, Appellant's attorney implied through his questions that D.B. had rehearsed or practiced his answers to the State's questions.

Prior to the admission of D.B.'s interview at the Bridge, Appellant made three objections, i.e., (1) D.B. was not under oath at the time of the interview, (2) the video was hearsay testimony, and (3) the State's notice of the videotaped interview as an outcry was untimely.[5] The State responded that because Appellant questioned D.B.'s veracity during cross-examination, the interview was admissible as a prior consistent statement

[5] Appellant did not re-urge his objection that Price's testimony or the interview were inadmissible as outcry statements.

and Appellant had not put on any evidence that he was harmed by any untimely notice. At the hearing's conclusion, the trial court admitted the interview into evidence stating, "I am admitting [D.B.'s interview] . . . [a]nd subject to *all* objections that were made, I am admitting [D.B.'s interview]." During closing arguments, both the State and Appellant treated the contents of the interview as substantive evidence.

Thereafter, the trial court found Appellant guilty of all three counts of aggravated sexual assault, as alleged in the indictment. The trial court also found the second enhancement paragraph "true" and sentenced Appellant to confinement for fifty years.

ISSUES ONE AND TWO

Appellant raises two issues, i.e., (1) the Bridge interview is insufficient to support a conviction based on Appellant performing oral sex on D.B. (Count Three) (Number 07-16-00314-CR) because the trial court found that the interview was admissible under the hearsay rule as a prior inconsistent statement and (2) because a bench trial was conducted, a "jury fee" of $4.00 in the *Bill of Costs* was improper. We find that D.B.'s Bridge interview was admissible, and it provided sufficient evidence to support a finding of guilt as to Count Three (Number 07-16-00314-CR). We also strike the "jury fee" of $4.00 levied in the *Bill of Costs* pertaining to Count One (Number 07-16-00312-CR).[6]

HEARSAY OBJECTION

We review the trial court's decision to exclude or admit evidence based on an abuse of discretion standard. *Frazier v. State*, 523 S.W.3d 320, 336 (Tex. App.—Amarillo 2017, Appellant's pet. ref'd, State's pet. granted) (citing *Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990) (en banc)). We will sustain the trial court's decision if

[6] In its brief, the State candidly conceded that the "jury fee" was improper. We agree.

that decision is correct on any theory of law applicable to the case. *Id.* at 337 (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990) (en banc)).

Article 38.072 of the Texas Code of Criminal Procedure creates a hearsay exception for a child's first outcry of sexual abuse to an adult. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2017).[7] The statute applies only to out-of-court statements that (1) describe the offense, (2) are made by the child, and (3) are made to the first person, eighteen years of age or older, other than the defendant, to whom the child . . . made a statement about the offense. *See* art. 38.072(a)(1)(A), (2), (3). "To qualify as a proper outcry statement, the child must have described the alleged offense in some discernible way and must have more than generally insinuated that sexual abuse occurred." *See Tear v. State*, 74 S.W.3d 555, 559 (Tex. App.—Dallas 2002, pet. denied), *cert. denied*, 538 U.S. 963, 123 S. Ct. 1753, 155 L. Ed. 2d 517 (2003).

We find that D.B.'s statement does meet the requirements of article 38.072. D.B.'s Bridge interview describes a distinct separate offense not previously the subject of an outcry statement to any other person. Furthermore, Appellant does not challenge whether D.B.'s outcry statement meets the statutory requirements of article 38.072. Accordingly, the trial court properly admitted D.B.'s outcry statement made during the videotaped interview at the Bridge. *Id.* at 559. *See Moore v. State*, No. 03-12-00787-CR, 2015 Tex. App. LEXIS 2638, at *30-35 (Tex. App.—Austin 2015, pet. ref'd) (mem. op., not designated for publication).

[7] Hereafter, provisions of the Texas Code of Criminal Procedure will be referred to simply as "art. ___."

SUFFICIENCY OF THE EVIDENCE—COUNT THREE

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 33 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under that standard, in assessing the sufficiency of the evidence to support a criminal conviction, this court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 912. This standard gives full play to the responsibility of the trier of fact to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319. *See Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007).

The elements of aggravated sexual assault, as applicable to the allegations in Count Three, are that Appellant (1) intentionally or knowingly, (2) caused his sexual organ, (3) without D.B.'s consent, (4) to contact or penetrate D.B.'s mouth. *See* TEX. PENAL CODE ANN. § 22.021(a)(1) (West Supp. 2017). During the Bridge interview, D.B. specifically stated that Appellant's sexual organ contacted his mouth.

A child victim's testimony, such as D.B's, is sufficient to support a conviction for sexual assault under chapter 21, section 22.021 of the Penal Code, if the child is a victim of a sexual offense and informed any person, other than the defendant, of the alleged

offense. *See* art. 38.07(a).[8] *See also Martinez v. State*, 178 S.W.3d 806, 814 (Tex. Crim. App. 2005) (noting that article 38.07 "deals with the *sufficiency* of evidence required to sustain a conviction for" certain sexual offenses against children, disabled, or elderly persons) (emphasis supplied). On appeal, Appellant does not assert that the statutory requirements of article 38.07 were not met. Hearsay evidence properly admitted pursuant to article 38.072, an exception to the hearsay rule, is considered "substantive evidence, admissible for the truth of the matter asserted in the testimony." *See Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991). Moreover, the parties treated D.B.'s outcry to Price as substantive evidence in their closing arguments and the trial judge, as fact finder, apparently treated his outcry as substantive evidence of the offense as well. Accordingly, we find the evidence sufficient to support Appellant's conviction under Count Three of the indictment.

CONCLUSION

We modify the *Bill of Cost*s in Number 69,637-A Count One (Number 07-16-00312-CR) to strike the "jury fee" of $4.00 levied and affirm the judgments of the trial court as modified.

Patrick A. Pirtle
Justice

Do not publish.

[8] The requirement that a victim inform another person of the alleged offense does not apply if at the time of the alleged offense, the victim was (1) seventeen years of age or younger, (2) sixty-five years of age or older, or (3) eighteen years of age or older who by reason of age or physical or mental disease, defect, or injury was substantially unable to satisfy the person's need for food, shelter, medical care, or protections from harm. *See* art. 38.07(b). Here, D.B. was eight years old at the time of the offense.