In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00033-CR

ROBERTO ANTONIO SANCHEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 355th District Court
Hood County, Texas,[1]
Trial Court No. CR14583, Honorable Ralph H. Walton, Jr., Presiding

July 26, 2021

MEMORANDUM OPINION

Before QUINN, CJ., and PIRTLE and DOSS, JJ.

Appellant, Roberto Antonio Sanchez, was convicted following a jury trial of aggravated sexual assault of a child younger than thirteen years of age and was sentenced to confinement for forty years.[2] On appeal, Appellant raises two issues

[1] Originally appealed to the Second Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

[2] *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (2)(B), (e) (West 2019) (a first-degree felony).

asserting the State's evidence at trial was (1) legally and (2) factually insufficient. We affirm the trial court's judgment.

Background

In September 2019, an indictment issued alleging that on or about November 4, 2017, Appellant intentionally or knowingly caused his mouth to contact the female sexual organ of CN03, a child younger than the age of thirteen.[3] In October 2019, a jury trial was held.[4]

The State's evidence at trial established that on November 4, 2017, CN03 was three years old. She lived with her mother and brother. On that day, the family was visited by CN03's aunt and Appellant. During the relevant time period, CN03's mother and aunt were in one room watching a movie and eating dinner. Appellant was in a bedroom; CN03 was with him.

When CN03's mother went back to the bedroom to check on her daughter, her daughter jumped; Appellant also jumped off the bed. CN03's mother became uneasy and called CN03 to the bathroom. She asked her daughter what she and Appellant were doing. CN03 initially responded she and Appellant were watching videos on his phone. When her mother asked her if she was sure, CN03 began crying and replied that she did not want to get into trouble because "it's inappropriate."

[3] "CN03" is a pseudonym used to protect the minor's identity.

[4] The indictment originally contained a second count that was dismissed on the State's motion prior to trial.

CN03 then told her mother that Appellant pulled her shorts down and licked her "tutu" twice.[5] CN03's mother and aunt confronted Appellant, who denied contact with the child. CN03's mother described Appellant as sweating and nervous. Appellant left; the police were called.

Later that same evening, Ashley Briley, a forensic interviewer and certified peace officer, was referred by Hood County dispatch to CN03's home to investigate the allegations. After an initial interview with the child's mother, Briley directed them to go to Cook Children's Medical Center for a sexual assault nurse exam (SANE).

Law enforcement officers located Appellant; he was arrested. After Briley read Appellant his *Miranda* rights,[6] he gave inconsistent answers to some of Briley's questions. For example, Appellant initially denied being in the bedroom, but later, changed his story and said he had been in the bedroom. Appellant also said he did not remember being in the bedroom. Appellant denied licking CN03 and said he was helping CN03 go to the bathroom. When discussing whether Appellant thought his saliva would be detected on CN03's vagina, Briley described Appellant's response as follows: "He said initially that he was pretty sure it wouldn't be on there and then followed up – he said that he was certain that it would not be on there." With assistance from a search warrant, Briley obtained Appellant's DNA via a buccal swab.

Stacy Henley, a SANE nurse examiner with Cook Children's Medical Center, obtained swabs from CN03's perineum, clitoral hood, inner labia, outer labia, and perianal

[5] CN03 uses the word "tutu" to refer to her vagina.

[6] *Miranda v. Arizona*, 384 U.S. 436, 467 (1967).

areas. She testified that if another person's DNA is found on the swabs, it would indicate a very recent contact, as saliva on a female's sexual organs can wash away easily.

Peggy Le, a senior forensic biologist with the Tarrant County Medical Examiner's Office, obtained the swab cartons from Appellant's buccal swabs, as well as the swabs obtained from the examination of CN03. DNA analysis, discussed in a report that was admitted into evidence without objection, revealed DNA consistent with Appellant's male genetic line existing on the swab of CN03's outer labia, as well as a partial profile from swabs taken of CN03's, perineum, inner labia, and perianal areas. She acknowledged, however, that the testing makes no distinction between DNA recovered from saliva versus from skin cells.

Appellant took the stand to testify in his own defense. After discussing his rather lengthy criminal history, Appellant testified about his relationship with CN03's aunt and mother, as well as his role in caring for the children. CN03 testified he often took care of the children and wiped CN03 after she went to the bathroom. Appellant said that because he was smoking marijuana and the home was not particularly clean, "my nose would always be runny and I'd always be coughing. You know, I would – I'm sure whenever I would cough, spit would – you know, saliva would come out." Appellant said that during the time proximate to the outcry, CN03 was jumping around, laughing, and "acting completely normal."

Appellant also took the position that CN03 had been inconsistent in her account of what occurred. Appellant related that initial reports said he had licked CN03 over her shorts, but CN03's mother said the child's shorts had been removed.

The jury subsequently found Appellant guilty of aggravated sexual assault of a child; he was sentenced to forty years' confinement. He now brings this appeal.

Sufficiency of the Evidence

The Texas Court of Criminal Appeals held in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), that there is "no meaningful distinction between the legal sufficiency standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and the factual sufficiency standard set forth in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996). *See Brooks*, 323 S.W.3d at 894-95. Accordingly, we hold as the Court of Criminal Appeals did, that the *Jackson v. Virginia* standard is the "only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks*, 323 S.W.3d at 895, 902, 912. We will thus treat Appellant's two issues as a single issue.

In a legal sufficiency challenge, we determine whether, viewing all of the evidence in a light most favorable to the jury's verdict, any rational jury could have found the essential elements of the charged offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). Evidence may be legally insufficient when the record contains either no evidence of an essential element, only a modicum of evidence of an element, or if it conclusively establishes a reasonable doubt. *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013). We may not substitute our judgment for that of the factfinder or re-weigh the evidence. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The factfinder

is the exclusive judge of the facts, the credibility of witnesses, and the weight to be given their testimony. *Merritt v. State*, 368 S.W.3d 516, 525-26 (Tex. Crim. App. 2012). Therefore, we presume the jury resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that determination. *Id*.

Analysis

Appellant committed an aggravated sexual assault if he caused CN03's sexual organ to contact his mouth. *See* TEX. PENAL CODE ANN. § 22.021(a)(B)(iii) (West 2019).

CN03's mother testified without objection that CN03 said Appellant pulled her shorts down twice and licked her "tutu," the child's term for a vagina. Appellant's conviction is supportable on the uncorroborated statement of CN03 so long as she informed any person, other than Appellant, of the offense within one year after it occurred. TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West Supp. 2020). *See also Tear v. State*, 74 S.W.3d 555, 560 (Tex. App.--Dallas 2002, pet. ref'd).

CN03's outcry is supported by the results of the tests performed on the swabs taken of CN03 and Appellant. Specifically, DNA testing on the swabs, presented to the jury without objection, showed that Appellant or someone in Appellant's male genetic line had contact with CN03's outer labia, inner labia, perineum, and perianal areas.

Appellant's approach on appeal is to question the credibility of the testimony of CN03's mother and to suggest a non-sexual reason for how his DNA reached CN03's vaginal area. However, the jury is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony; the jury is likewise free to accept or reject all or any part of their testimony. *See Papke v. State*, No. 05-97-0177-CR, 2000 Tex. App.

LEXIS 5817, at *7-8 (Tex. App.--Dallas Aug. 30, 2000, pet. ref'd) (mem. op., not designated for publication) (citing *Santellan v. State,* 939 S.W.2d 155, 165 (Tex. Crim. App, 1997)). Here, as demonstrated by their verdict, the jury chose to believe the testimony of CN03's mother of CN03's account and the DNA evidence instead of Appellant's alternative theory of how his DNA reached CN03's outer labia, inner labia, perineum, and perianal areas. Because we find, in light of the proper scope of review that sufficient evidence supports the jury's verdict, Appellant's issues are overruled.

Lawrence M. Doss
Justice

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