NO. 12-11-00141-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

WESLEY DON PARISH, APPELLANT	***§***	***APPEALS FROM THE 159TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Wesley Don Parish appeals his convictions for two counts of aggravated sexual assault of a child. In one issue, Appellant challenges the sufficiency of the evidence to support his conviction. We affirm.

BACKGROUND

An Angelina County grand jury indicted Appellant for two counts of aggravated sexual assault of a child and one count of indecency with a child committed on or about September 4, 2010. The State dismissed the indecency charge and produced evidence through the testimony of several witnesses, including the two child victims identified as John Doe and Jane Doe. Appellant testified during his case in chief, along with his mother, sister, and nephew. The jury found Appellant guilty of both counts of aggravated sexual assault of a child and sentenced him to ten years of imprisonment for each count. The trial court ordered that the sentences be served consecutively.

VENUE

Appellant first argues that the evidence is legally insufficient to support his conviction for

Count I because there was no testimony that the alleged offense occurred in Angelina County, Texas.[1]

Venue refers to the county or counties in which the state is permitted to file and prosecute criminal charges. *See* 40 George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 5:1 (3d ed. 2011). The court of appeals must presume that venue was proved in the trial court unless the record affirmatively shows the contrary, or the matter was disputed in the trial court. *See* TEX. R. APP. P. 44.2(c)(1). Venue is not an element of the offense and need not be shown beyond a reasonable doubt. *See* ***Murphy v. State***, 112 S.W.3d 592, 604 (Tex. Crim. App. 2003); ***Villani v. State***, 116 S.W.3d 297, 309 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

To sustain the allegation of venue, it shall only be necessary to prove by a preponderance of the evidence that the county has venue. TEX. CODE CRIM. PROC. ANN. art. 13.17 (West 2011); *see also* ***Moore v. State***, 694 S.W.2d 528, 530 (Tex. Crim. App. 1985). Generally, venue is proper in the county in which the offense was committed. *See* TEX. CODE CRIM. PROC. ANN. art. 13.18 (West 2011). A sexual assault case may be prosecuted in the county in which it is committed, in the county in which the victim is abducted, or in any county through or into which the victim is transported in the course of the abduction and sexual assault. *See* ***id.*** § 13.15.

In the case at bar, the victims' mother and stepfather testified that their home was located in Angelina County, Texas, and that John and Jane Doe lived in the same home. John and Jane both testified that the assaults occurred inside their home. Specifically, they testified that the assaults occurred mostly in John Doe's bedroom. Because venue was not raised during trial and the record shows that the State's witnesses described the events as having occurred in their Angelina County home, we conclude that venue was proper. We overrule the portion of Appellant's sole issue pertaining to venue.

SUFFICIENCY OF THE EVIDENCE

In his remaining arguments, Appellant contends that the evidence is legally insufficient to support his conviction on either count of aggravated sexual assault of a child.

[1] On appeal, Appellant challenges the sufficiency of the evidence to support venue. He also makes two arguments challenging the sufficiency of the evidence to support his convictions. The burden of proof for venue is different from the burden of proof for the elements of the offense. Accordingly, we address venue separately.

Standard of Review

Under the single sufficiency standard, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *see also* ***Brooks v. State***, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We defer to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789. Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor and circumstantial evidence alone can be sufficient to establish guilt. ***Id.***

Our deferential review still requires juries to reach rational conclusions. *See* ***Brooks***, 323 S.W.3d at 902. Juries are not permitted to come to conclusions based on mere speculation or factually unsupported presumptions or inferences. *See* ***Hooper***, 214 S.W.3d at 15. A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. ***Id.*** at 16. An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. ***Id.***

The sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the appellant was tried. ***Id.***

As alleged in Count I of the indictment, the State was required to prove beyond a reasonable doubt that Appellant intentionally or knowingly caused the penetration of Jane Doe's mouth with his sexual organ on or about September 4, 2010, and that on the date of the offense, Jane was younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(ii) (West 2011). In Count II, the State was required to prove beyond a reasonable doubt that Appellant intentionally or knowingly caused John Doe's sexual organ to contact or penetrate the mouth of Jane Doe on or about September 4, 2010, and that on the date of the offense, John was

younger than fourteen years of age. *See* ***id.*** § 22.021(a)(1)(B)(iii).

Applicable Law

A conviction of aggravated sexual assault of a child is supportable on the uncorroborated testimony of the victim of the sexual offense. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 2011). A child is not required to be able to testify about penetration, and is not expected to testify with the same ability and clarity as is expected of mature and capable adults. ***Villalon v. State***, 791 S.W.2d 130, 133-34 (Tex. Crim. App. 1990). Medical testimony is not required to sustain a defendant's conviction for aggravated sexual assault of a child. *See* ***Bargas v. State***, 252 S.W.3d 876, 888-89 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

The "on or about" language of an indictment allows the State to prove a date other than the one alleged so long as the date proven is anterior to the presentation of the indictment and within the statutory limitation. *See* ***Wright v. State***, 28 S.W.3d 526, 532 (Tex. Crim. App. 2000). There is no limitations period for the offense of aggravated sexual assault of a child. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01 (West 2011).

Discussion

Appellant argues that the evidence is insufficient to support his conviction on Count I of the indictment because there was no testimony explaining "how" Appellant caused the penetration of Jane's mouth and Jane never testified that the offense occurred in September of 2010. Appellant maintains that the evidence supporting his conviction on Count II is also insufficient because there was no testimony explaining "how" Appellant made John and Jane perform sexual acts on each other. Appellant implies in his argument that the sexual behavior John and Jane engaged in was voluntary and not forced by Appellant. Appellant also argues that the evidence is legally insufficient as to Count II because John's testimony revealed that Appellant was in a different room when John and Jane performed sexual acts on each other. Thus, Appellant contends, he could not have forced the children to engage in the sexual activity since he was not in the room when the activity occurred.

1. Count I—Evidence

Count I charged Appellant with causing penetration of Jane Doe's mouth by Appellant's sexual organ. During John's and Jane's testimony, the children referenced anatomically correct drawings of a boy and a girl to identify the parts of the body they were discussing. John testified that Appellant touched Jane in a "bad" way, but he did not say that he ever saw Appellant penetrate

Jane's mouth with his (Appellant's) sexual organ. John also testified that he heard Appellant tell Jane that he would make her "suck" Appellant's "d***." Jane testified that Appellant put his private in her mouth, and explained that Appellant made her do it when "he put my head up." She explained that when this occurred, "white stuff" would come out of Appellant's penis and that it tasted like "pee."

2. Count I—Date of Offense

The trial was held in March of 2011. Jane testified that she was currently in third grade and was eight years old, but about to be nine. When she testified about Appellant's penetration of her mouth with his sexual organ, she stated that this conduct took place at the first of the year in third grade. Jane's parents each testified that the children told them the assaults occurred around Labor Day weekend. The indictment was presented during the October-December 2010 grand jury term and was file marked November 30, 2010.

Both children testified that they delayed telling their parents about the sexual assaults because they were afraid they would be punished. John testified that he kept things a secret because Appellant threatened to "whoop" him for as long as he babysat him. Jane also testified that she was afraid to tell anyone for fear of receiving a "whooping."

3. Count II—Evidence

John testified that Appellant "made Jane suck [John's] private part" and that Appellant made John "hump" Jane. He also testified that Appellant would watch John and Jane while they engaged in sexual activity and sometimes Appellant would sit in the living room. John identified the body part that would penetrate Jane's mouth using anatomically correct drawings of a boy and a girl, and used "boy" and "girl" dolls to demonstrate what Appellant "made" John and Jane do to each other. Finally, John testified that he was forced to "hump" Jane "all the time" except when the children went to the lake and saw a "movie."[2] When asked "how" Appellant forced John and Jane to engage in sexual activity, John explained, "by push[ing] [John's] legs on [Jane]."

Jane used anatomically correct drawings of a boy and girl when she testified to explain how she had to "touch" John's penis "in the wrong way" with her "mouth." She also testified that Appellant would watch John and Jane perform sexual acts on each other. Jane admitted to lying in the past in order to keep from getting in trouble, but testified that "I didn't do anything else bad

[2] This "movie" was on a disc recovered from Appellant's truck by law enforcement, and its content was suggested to be pornographic because the writing on the disc said, "Porn-08." The disc was not played for the jury at trial.

with my brother . . . except for the things Uncle [Wesley] made me do."

4. Holding

We view the evidence in the light most favorable to the verdict and defer to the fact finder's credibility determinations. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789. From the evidence discussed above, a rational trier of fact could have found, beyond a reasonable doubt, that Appellant caused the penetration of Jane's mouth by his sexual organ and that Appellant caused John's sexual organ to penetrate Jane's mouth. From John and Jane's testimony about the assaults, when considered along with their parents' testimony, a rational trier of fact could have found, beyond a reasonable doubt, that the sexual assaults occurred on or about September 4, 2010. Therefore, we hold that the evidence is legally sufficient to support Appellant's convictions for aggravated sexual assault as alleged in Counts I and II of the indictment. Accordingly, we overrule Appellant's sole issue.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the judgment of the trial court.

SAM GRIFFITH
Justice

Opinion delivered May 23, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)