IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0639-18

DAVID RAY GRIFFITH, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE TENTH COURT OF APPEALS NAVARRO COUNTY

HERVEY, J., delivered the unanimous opinion of the Court.

O P I N I O N

Appellant, David Ray Griffith, was convicted of continuous sexual abuse of a child. The three judge panel of the court of appeals affirmed his conviction. Appellant's motion for panel rehearing was denied. Chief Justice Gray dissented because the evidence was insufficient to show that Appellant sexually assault the victim twice before her fourteenth birthday. Appellant filed a petition for discretionary review, and we agreed to

review the decision of the court of appeals.[1] We will reverse.

BACKGROUND[2]

In December 2013, Appellant's fourteen-year-old daughter, A.G., was riding home from evening church services with her friend and her friend's family when she whispered to her friend in the backseat of the pickup truck that her father had sexual intercourse with her. A.G. brought it up, according to her friend, because she was worried that she "would not go to heaven" since she was no longer a virgin. A.G. later told her friend's parents and other people, including her church pastor, investigators, and medical personnel about the abuse, but the details varied. A.G. said that her father abused her three to four times, but the timeline of that abuse at trial was sparse and uncertain. Not long after her outcry, A.G. recanted her allegations.

A.G. was born on April 4, 1999. She turned fourteen on April 4, 2013. The period of abuse spanned from 2012 to 2013. Appellant first abused A.G. over spring break of 2012, when she was twelve years old and was living with her family in her grandmother's mobile home in Dawson. The last three instances occurred while A.G. was staying at her

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[1]The ground for review asks,

> Whether, as stated by [Chief] Justice Gray in his dissent from Appellant's motion for rehearing, the evidence allowed the jury to have reasonably inferred that the second assault occurred on or before the victim's fourteenth birthday?

[2]Numerous witnesses testified; however, we only address the evidence about when the sexual assaults occurred as that is the only issue in this case. The court of appeals laid out the facts and procedural history in detail. *Griffith v. State*, No. 10-14-00245-CR, 2018 WL 1631651, at *1 (Tex. App.—Waco Apr. 4, 2018) (mem. op., not designated for publication).

father's house in Frost around January of 2013 after he and A.G.'s mother, Donna, separated. The separation lasted until May or June of 2013. During the separation, A.G. and her siblings moved back and forth between the Dawson house and the Frost house. Although A.G. never used specific dates, no one disputes that she was under fourteen when the first instance of abuse happened and that she was fourteen when the last two took place. The only question for us to decide is whether there is sufficient evidence to believe that a second act of sexual misconduct occurred sometime between January and early April—after Appellant moved to Frost and A.G. started staying there but before she turned fourteen years old.

STANDARD OF REVIEW

Evidence is legally sufficient to support a criminal conviction if any rational trier of fact could have found each essential element of the offense beyond a reasonable doubt after considering the cumulative force of all the incriminating circumstances in the light most favorable to the conviction. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ramsey v. State*, 473 S.W.3d 805, 808–09 (Tex. Crim. App. 2015).

The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses, and juries may draw multiple reasonable inferences from the facts so long as each is supported by the evidence presented at trial. *Jackson*, 443 U.S. at 319; *see Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007). The jury is not, however, allowed to draw inferences based on speculation. *Hooper*, 214 S.W.3d at 16. An inference based

on speculation is insufficiently based on the evidence to support a finding beyond a reasonable doubt. *Id.* We presume that the jury resolved conflicts in the evidence in favor of the verdict when the record supports reasonable, but conflicting, inferences. *Jackson*, 443 U.S. at 326. Direct evidence and circumstantial evidence are equally probative of whether the evidence is legally sufficient. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013).

ANALYSIS

The evidence showed that A.G. and her family lived in Dawson in a trailer home in 2012. In January 2013, Appellant and Donna separated. Donna moved into her mother's home, and Appellant moved into a home in Frost. During the separation, A.G. would sleep at her grandmother's house sometimes and other times at the Frost house. In May or June of 2013, Appellant and Donna reconciled, and Donna moved into the house in Frost. In December 2013, A.G. made the outcry to Washburn that her father abused her. Appellant subsequently agreed to move out of the Frost house.

A.G. was first abused when she lived in Dawson. The last three instances of abuse took place in the Frost house. Shortly after A.G.'s outcry, Appellant and Donna met with Amy Taylor, the CPS worker. During that meeting, Taylor separately asked Donna if her daughter had outcried to her about Appellant before, and Donna responded that she had. According to Donna, A.G. made the allegation "a few years ago" when she was twelve

years old and they lived "in a different location."[3] (Donna testified in mid-2015, a few years after the family lived in Dawson where A.G. was abused for the first time when she was twelve years old.) Donna also said that A.G. made the allegation before Appellant

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[3]During the relevant exchange, the following took place,

> [STATE]: When [A.G.] woke you up that night and told you she was seeing things, did you call poison control?
>
> [DONNA]: No, I did not.
>
> [STATE]: Did you take her to a doctor?
>
> [DONNA]: No.
>
> [STATE]: How old was she at that time? She had to have been what -- eleven or twelve?
>
> [DONNA]: No, she was thirteen.
>
> [STATE]: Well, if she told you -- if you left [Appellant] in January of 2012, [A.G.] was born in --
>
> [DONNA]: Wait a minute. I'm talking about something that was earlier. I don't know what --
>
> [STATE]: Right. Right. But if we just used January of 2012, was that -- as how old [A.G.] was at that time. In January of 2012 she was twelve years old, right?
>
> [DONNA]: No.
>
> [STATE]: She was born April 4, 1999?
>
> [DONNA]: Yes. Yes. No, because she's fifteen now.
>
> [STATE]: Right. But here -- if she was born in '99 in April, she turned thirteen in April of 2012, right?
>
> [DONNA]: Yes. So, she was twelve, yes.

moved to Frost in January 2013.

To prove that a person is guilty of continuous sexual abuse of a child, the State must show that there were at least two incidents of sexual abuse against a victim who is younger than 14 over a period of at least 30 days. TEX. PENAL CODE §21.02(b). Evidence of the abuse against Appellant, specifically the second instance which is at issue here, primarily consisted of outcry testimony because A.G. recanted shortly after her outcry. The two outcry witnesses were Glenda Washburn, the mother of A.G.'s friend, and Lydia Bailey, a forensic investigator with the Children's Advocacy Center in Navarro County. A.G. made her outcry to Washburn after returning from evening church services. Washburn testified that A.G. told her that her father had intercourse with her three or four times and that he had given her a prescription sleep-aid named Ambien. A.G. also told her that Appellant first abused her when they lived at her grandmother's mobile home in Dawson when she was twelve years old and that the second instance of abuse was at the Frost home in her bedroom. Washburn had no idea about the dates of the abuse, however, because A.G. never gave her dates.

Bailey testified that she interviewed A.G. on December 30, 2013 and that A.G. told her that Appellant first abused her in the Dawson mobile home and would give her Ambien to help her fall asleep. But she also told Bailey some things that she did not tell Washburn. For example, she told Bailey that the first incident took place around 2012 spring break, and she described the second incident to Bailey in detail. She told Bailey

that,

> she had wanted her dad to sleep in the room with her in case she was afraid. And so, she woke up and her dad was trying to take her shirt off. And she told him to stop, but before he did it, he had put his hands in her pants and he had also touched her boob and her vagina. And she described that his hand was moving when it touched her vagina and that his finger went inside of her.

Taylor, the CPS investigator, told A.G.'s mother about her daughter's outcry on December 30, 2013, and Donna told Taylor that A.G. had made a prior outcry. According to her, one night she was asleep on the couch when A.G. came to her and told her that she was seeing things and that she had gone to her parent's bed to sleep, and Appellant "turned [her] over and threw his hand over her stomach." A.G.'s mother did not believe the allegation, however, because she thought A.G. was hallucinating, which had happened before when she took Ambien.

The court of appeals concluded that the evidence was legally sufficient. It reasoned that,

> Bailey and Washburn testified that A.G. told them that subsequent acts of abuse occurred in Frost, Texas. Bailey further testified that A.G., in her outcry statement, had told [her mother] that [Appellant] had inappropriately touched her. [A.G.'s mother] confirmed that A.G. made such an accusation, although she stated that she thought A.G. was hallucinating due to an overdose of Ambien. [A.G.'s mother] also testified that she separated from [Appellant] after A.G.'s accusation—beginning sometime in January 2013 and lasting until May or June of that year—although she denied that A.G.'s outcry was the reason. [A.G.'s mother] and [grandmother] also testified that A.G. and her sisters went back and forth between [her grandmother's] house, where [A.G.'s mother] had moved, and the Frost house, where [Appellant] remained, during the separation. The jury could reasonably have concluded from the foregoing testimony that [Appellant] sexually

> abused A.G. a second time between January 2013 and A.G.'s fourteenth birthday on April 4, 2013, and that the period of time between the two incidents of sexual abuse exceeded thirty days.

Griffith, 2018 WL 1631651, at *3.

On denial of rehearing, Chief Justice Gray dissented. After further consideration, he was persuaded that the evidence was sufficient to prove that two or more assaults occurred, but that it was insufficient to show that the second assault occurred before A.G.'s fourteenth birthday. He explained that,[4]

> [T]he dates the assaults could have occurred were bracketed by where the victim was living at the time of each assault. The victim had her fourteenth birthday when she lived at the second location. She was also living at the second location when the second assault occurred. The second assault could have been before her birthday. It could have been after. There is no evidence to assist the jury in deciding whether it happened before or after. It matters. Thus, it may be reasonable to speculate the second assault occurred before her fourteenth birthday. But it is just as reasonable to speculate that it occurred after her fourteenth birthday. And there is no evidence to help or point the jury to a reasonable inference that the second sexual assault occurred after she was living at the new location and before her fourteenth birthday. That is what distinguishes speculation from inferences. Something that allows the jury to reasonably infer the required finding. Recognizing that the State is entitled to file a response before a motion for rehearing is granted, I would request a response.

The State argues that the court of appeals was correct that a rational jury could have inferred that the second event happened in January 2013 because the evidence

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[4]Chief Justice's dissenting note is not published nor is it available on an electronic database. It is posted to the court of appeals's website. Note of Chief Justice Gray on Order Denying Motion for Rehearing at 2 (May 23, 2018), *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=1a7a62f9-54e8-445b-9e69-283423cc1fee&coa=coa10&DT=Order&MediaID=1dce8f46-e7ab-4034-b814-0136990e46ea (last visited March, 4, 2019).

showed that A.G. was abused after she started staying at the Frost house, that A.G. outcried to Donna about the second assault in January 2013, and that Donna testified that she separated from Appellant after A.G. made the outcry. A vital part of the State's argument is that A.G.'s prior outcry was made in January 2013 and was about the second assault. To support that argument, the State points to similarities between the testimony of Bailey, to whom A.G. outcried specifically about the second assault, and A.G.'s mother.[5]

Bailey's Testimony	Donna's Testimony
The victim woke up and [Appellant] was trying to take her shirt off. She told him to stop. He touched her breast. He also put his hand down her pants and digitally penetrated her.	[Appellant] came to the victim in the middle of the night and put his hand on her stomach.
[Appellant] drugged the victim with Ambien to make her sleep.	The victim was abusing Ambien and having hallucinations.
The victim's mother laughed it off when the victim tried to outcry.	[A.G.'s mother] did not take the allegation seriously because the victim was hallucinating.

According to the State, although Bailey testified about a sexual assault, and Donna merely testified that Appellant put his hand on A.G.'s stomach, they were actually talking about the same incident, and Donna was just trying to "downplay" the allegation because she did not believe A.G.

For the State's theory to be true that Donna was telling Taylor about the second

[5]The State includes the table in its brief on the merits.

instance of abuse,[6] a jury would have had to believe that, when Donna said that the allegation was made when they lived at "a different location," Donna actually meant that A.G. made the allegation at their current house in Frost, not in Dawson where they previously lived and where A.G. was abused for the first time. Further, a jury would have had to believe that, when Donna said that A.G. was twelve years old when she made the allegation, she actually meant that A.G. was thirteen years old, and that when Donna said that A.G. outcried to her about Appellant abusing her in her parent's bedroom, she was mistaken because A.G. told Bailey that the second instance of abuse took place in her bedroom in Frost.[7]

We think that a fair reading of Donna's testimony shows that, when she spoke about the prior allegation made by A.G., she was talking about the first instance of abuse in Dawson in 2012 when A.G. was twelve years old. Further, while a rational jury did not

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[6]The State argues that A.G.'s outcry to her mother was made in January 2013 after the second instance of abuse, but Donna's testimony does not support that contention,

> [STATE]: Okay. So, when you told her, you got that wrong?
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> [DONNA]: The year -- it was just last year that we were separated for four months.
>
> [STATE]: And that's when [A.G.] had told you?
>
> [DONNA]: It was -- she had told me before that, when we lived in a different location.

[7]The State's recitation of Donna's testimony is inaccurate. In its table, the State alleged that A.G. told Donna that her father came to her room in the middle of the night and put his hand on her stomach. But that was not Donna's testimony. She testified that A.G. told her that the assault took place in her parent's bedroom. The difference is stark.

have to believe Donna that A.G. outcried to her "a few years back" when they lived in "a different place" or that A.G. was twelve years old at the time of the outcry, there was no evidence from which a rational jury could reasonably infer that A.G. outcried to Donna about the second assault in January 2013 because the only witness to testify about the timing of the allegation was Donna, and she said that it happened before January 2013.[8] As Chief Justice Gray correctly noted, the evidence is sufficient for a rational jury to have reasonably inferred that the second event happened and that it happened as early as January 2013 in the Frost house, but it is insufficient to reasonably infer that the second act of abuse took place before April 4, 2013.

Part of the problem with the dates in this case is a disconnect between the case that the State believed that it could prove, and the evidence that it presented to the jury. The State believed that it could show that the first of the Frost incidents occurred before A.G.'s birthday on April 4, 2013. There were lengthy pretrial arguments about the timeline presented by the State, but that evidence was never presented to the jury. At the pretrial outcry hearing, Bailey testified that the victim told her about four incidents. The first was the Dawson incident in 2012. The second incident occurred in the house in Frost. The third time happened six or seven months after the second time, and the fourth time happened "a couple of weeks" after the third time. A.G. also told Bailey that the

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[8]The court of appeals relied on testimony from A.G. that she had previously told her mother that Appellant had inappropriately touched her. *Griffith*, 2018 WL 1631651, at *3. It is true that A.G. said that, and Donna confirmed it, but A.G. never said when she made that allegation to her mother.

fourth incident was three weeks before the December 30 interview. Bailey testified that A.G. used the term "a couple of weeks" in a conversational manner, and did not necessarily mean a literal two week period. The State clarified that the fourth assault happened between Thanksgiving and Christmas. The victim did not use any holidays or events to set a date for the third assault, but she did say that it happened when she was being home schooled and it was "hot outside."

Using these time periods, the State attempted to count back from the date of the forensic interview. The State's theory was that the fourth assault happened in early December or late November. "A couple of weeks" earlier would put the third incident in mid-November, but the prosecutor took the "couple of weeks" comment and seemed to stretch that time, arguing that the third incident took place in October or even September—as much as eight weeks before the fourth incident—because other evidence showed that A.G. was being home schooled and that it was "hot outside" at the time. Based on this interpretation, and counting back another six or seven months from September, the prosecutor put the second incident in February or March. This would have been before A.G.'s fourteenth birthday in April. The State's proposed timeline was fiercely contested at the pretrial hearing, with the defense accusing the State of "messing" with the dates to try and place the second incident before A.G.'s fourteenth birthday. The State's timeline at the pretrial outcry hearing was plausible, and the jury might have used these dates to reasonably infer that the second assault occurred before A.G.'s fourteenth

birthday, but the problem is that none of this evidence was presented to the jury. A jury cannot make inferences based on evidence that they never heard.

REMEDY

When the evidence is legally insufficient to support a conviction, we render an acquittal unless the evidence shows that, in finding the defendant guilty, the jury necessarily also found that he was guilty of a lesser-included offense, and the evidence is sufficient to support a conviction for that lesser offense. *Arteaga v. State*, 521 S.W.3d 329, 340 (Tex. Crim. App. 2017). Appellant argues that his conviction for continuous sexual abuse of a child should be reformed to reflect that he was convicted of sexual assault. We agree that the judgment of conviction should be reformed, but we conclude that it should be reformed to show that Appellant was convicted of first-degree aggravated sexual assault of a child. *Lee v. State*, 537 S.W.3d 924, 927 (Tex. Crim. App. 2017) (reforming a conviction for continuous sexual assault of a child to aggravated sexual assault of a child after finding the evidence of the greater offense to be insufficient).

CONCLUSION

We reverse the judgment of the court of appeals, reform the trial court's judgment to reflect that Appellant was convicted of first-degree aggravated sexual assault of a child, and remand this cause to the trial court to conduct a new punishment hearing.

Delivered: April 3, 2019

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