COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JARRATT RIPLEY,	§	No. 08-19-00040-CR
Appellant,	§	Appeal from the
v.	§	112th District Court
THE STATE OF TEXAS,	§	of Pecos County, Texas
Appellee.	§	(TC# P-3829-112-CR)

O P I N I O N

Jarratt Ripley ("Defendant") appeals from his conviction for indecency with a child by contact. Defendant challenges the sufficiency of the evidence to support that conviction, as well as the trial court's failure to grant a new trial in the face of what Defendant contends was undisclosed *Brady*[1] material. We affirm.

BACKGROUND

Defendant is the eldest son of Ken Ripley and his former wife. The couple also had a daughter[2] and a second son, John Ripley. A few years after his divorce, Ken Ripley re-married.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] Ken and his former wife also have a daughter who is not involved in the facts of this case.

His second wife, Geneva, had two children from a previous marriage, J.D. and M.R.[3] Ken adopted M.R. when she was 5 years old. The age difference between Defendant and M.R. is approximately seventeen years. Defendant spent some time in the armed forces, worked for a year in a San Antonio middle school, and then worked in an oilfield until 2011, when he suffered an injury that resulted in the amputation of his left leg. Defendant visited Ken and Geneva's home periodically until the spring of 2014, when M.R. informed her mother that Defendant touched her inappropriately and had been doing so for years.

Ken Ripley testified that Defendant liked to play with and tickle M.R. when he was home, and that he often played with her in her room with the door closed. He also testified that Defendant always sat next to M.R. in the car on family road trips. M.R.'s brother, J.D., similarly testified that Defendant liked to tickle M.R., often played with her in her room with the door closed, and always wanted to sit next to M.R. in the car.

Ken learned from Geneva, very soon after Geneva was told, that M.R. had made an outcry against Defendant. He described his initial reaction: "quite frankly, we were like a couple of zombies at the beginning, because we couldn't believe it. We just – well, it was hard to believe. And we – we were devastated." He further described that, a day or two after the disclosure, Ken called the Defendant and told him about the allegations made by M.R., and, to protect her, he let Defendant know he could no longer come and visit with the family. When asked to describe Defendant's reaction, Ken testified that Defendant did not want the visitation to end; instead, he wanted to continue visiting, but keeping M.R. with Ken and Geneva at all times. When Ken refused

[3] The victim in this case was assigned the pseudonym "Hope" in the early stages of this case and is identified by that name in the indictment. She chose, however, to use her real name throughout the trial. To respect her choice to use her own name while also maintaining her privacy, we will refer to her as "M.R."

to allow visits, the Defendant asked whether Ken had plans to report the allegations or tell defendant's wife. Ken described that the Defendant did not admit or deny what he had done, and instead, he seemed concerned with the potential impact on his reputation and his marriage.

On cross-examination, Defendant's counsel repeatedly questioned Ken about whether he had asked Defendant to loan or give him money from a substantial personal injury settlement Defendant had received for his leg injury. Through questioning, defense counsel accused Ken of manipulating M.R. to make allegations against the Defendant as a scheme to "bribe" or threaten him into giving Ken money. Ken denied the accusation as ridiculous. And Defendant, himself, testified that, while Ken offered him financial advice after he received the personal injury settlement, Ken never asked for money outright.

Defendant's counsel also vigorously cross-examined Ken concerning the time of M.R.'s outcry to her mother. Ken testified that it occurred in March 2014, and that Defendant was not welcome in their home after that time. But Defendant demonstrated that Ken and Geneva had come to San Antonio to watch Defendant perform in a musical production in April 2014, and that Defendant had visited them in their home on Easter weekend, also in April 2014. When confronted with those events, Ken admitted that he must have been mistaken about the outcry having occurred in March 2014. He remained adamant that the outcry occurred after the San Antonio production and after Easter weekend, and testified that his recollection that the outcry was in March was "an honest mistake."

Geneva Ripley testified that M.R. told her in 2014, when M.R. was 13 years old, that Defendant touched her "private parts" over her clothes, and that he had done so for as long as she could remember. Although Geneva had originally given a statement saying that the outcry

occurred in March 2014, she testified that it occurred after they had gone to San Antonio to see Defendant perform, which, as noted above, occurred in April 2014. At first, M.R. related only that Defendant had rubbed his finger on her vagina, over her clothes. Over time, however, M.R. related additional details and more intrusive incidents.

M.R., who was seventeen at the time, testified to several instances of sexual abuse dating back to when she was 5 or 6 years old. For our purpose, we confine our discussion to the testimony relating to the offenses for which Defendant was convicted. M.R. testified that, on one occasion when she was approximately 8 years old, she was in her brother J.D.'s room, looking at his "stuff." Defendant came into the room and shut the door. He then started to rub his fingers on her vagina, over her clothes. On an earlier occasion, when M.R. was younger than 8, the family was gathered to celebrate John's birthday. Defendant, John, and M.R. were in the living room; J.D., Ken, and Geneva were either in that room or an attached kitchen area. Defendant picked M.R. up so that she was facing him, with her legs wrapped around him. Although Defendant was conversing with John, he was facing away from him. M.R. described how Defendant held her with one hand and touched her vagina, over her clothes, with the other. She also demonstrated for the jury how this occurred.

M.R. also testified to a similar incident occurring around Christmas 2013. M.R.'s mother was in the kitchen looking at magazines, and M.R. and Defendant were in the entryway to the kitchen, "some distance" away. M.R. stated that Defendant picked her up the same way she had previously demonstrated for the jury. She again described how he held her with one arm and touched her with his other hand on her vagina, over her clothes.

M.R., like Geneva and Ken, testified that she first told her mother about Defendant's

misconduct in 2014. She did not tell her mother earlier because Defendant told her not to, M.R. was afraid of Defendant, and M.R. was afraid of breaking up the family. M.R. finally told her mother because she "couldn't take it anymore" and wanted the abuse to stop.

Defendant was indicted on three counts of aggravated sexual assault of a child (counts one through three), one count of indecency with a child by exposure (count four), and two counts of indecency with a child by contact (counts five and six). The jury returned a verdict of acquittal on counts one through four, and a verdict of guilty on counts five and six. It assessed punishment at ten years' confinement and recommended that imposition of the sentence be suspended. The trial court entered judgments on the verdict.[4]

Defendant filed a motion for new trial which the court denied by written order signed on January 4, 2019. On January 8, 2019, Defendant filed a "Motion To Reconsider Denial Of Motion For New Trial, Supplemental Grounds And Formal Bill Of Exception." In that motion, he alleged that, on the same day the trial court denied his motion for new trial, the State disclosed new, material evidence that was previously unknown to him. That evidence consisted of (1) handwritten notes of an interview with K.P. conducted by an investigator with the district attorney's office, (2) a typed version of those notes, and (3) a memo from a member of the district attorney's staff explaining how the handwritten and typed notes (collectively, "Interview Notes") were discovered. These documents are discussed in further detail below in the context of Issue One.

DISCUSSION

[4] The court signed, entered, and filed a judgment of acquittal by jury and a judgment of conviction by jury on November 13, 2018. It signed and entered a nunc pro tunc judgment of conviction by jury on February 12, 2019, which was filed on February 13, 2019, and a second nunc pro tunc judgment of conviction by jury signed and entered on March 15, 2019, which was filed on March 18, 2019.

In his first issue on appeal, Defendant contends that the trial court erred by failing to grant a new trial once it became aware of what Defendant contends was "a clear *Brady* violation" that probably would have changed the outcome of the jury trial. In his second issue, Defendant contends that the evidence is legally and factually insufficient to support his conviction on two counts of indecency with a child by contact.

We consider each issue in turn.

A. Standards of Review

1) Motion for new trial

A trial court's denial of a motion for new trial is reviewed for abuse of discretion. *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013); *Burch v. State*, 541 S.W.3d 816, 820 (Tex. Crim. App. 2017). "A trial court abuses its discretion if no reasonable view of the record could support its ruling." *Okonkwo*, 398 S.W.3d at 694; *see Burch*, 541 S.W.3d at 820. The standard thus requires that the appellate court view the evidence in the light most favorable to the trial court's ruling. *Okonkwo*, 398 S.W.3d at 694; *Burch*, 541 S.W.3d at 820.

When a motion for new trial asserts a *Brady* violation, the reviewing court proceeds with deference to the trial court's underlying findings of fact but reviews the materiality of the alleged *Brady* evidence *de novo*. *See Ex parte Weinstein*, 421 S.W.3d 656, 664 n.17 (Tex. Crim. App. 2014); *see also Ex parte Chaney*, 563 S.W.3d 239, 264 (Tex. Crim. App. 2018) (materiality is a legal question that is reviewed *de novo*).

2) Sufficiency of the evidence

The standard for reviewing the legal sufficiency of the evidence to support a finding of guilt is "whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Arroyo v. State*, 559 S.W.3d 484, 487 (Tex. Crim. App. 2018); *accord Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018); *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018).

The Court of Criminal Appeals has abolished the factual sufficiency standard for reviewing the evidence supporting a criminal conviction. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The standard recited above is now the only sufficiency standard applicable to the elements the State is required to prove. *Id.*; *Cary v. State*, 507 S.W.3d 761, 765–66 (Tex. Crim. App. 2016) (legal sufficiency test is only standard appellate court should apply to determine whether evidence is sufficient to support a criminal conviction).

B. Denial of Defendant's motion for new trial

1) Elements of a *Brady* violation

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The State therefore has a duty to disclose favorable, material evidence.[5] *Pena v. State*, 353 S.W.3d 797, 811–12 (Tex. Crim. App. 2011); *Webb v. State*, 232 S.W.3d 109, 114 (Tex. Crim. App. 2007). To establish a *Brady* violation, a defendant must establish that (1) the State failed to disclose evidence, which is (2) favorable to him, (3) material,

[5] The State also has a statutory duty to "disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." TEX. CODE CRIM. PROC. ANN. art. 39.14(h). Defendant does not raise any argument concerning article 39.14, but relies solely on the duty to disclose as defined in *Brady*.

and (4) admissible in court. *Pena*, 353 S.W.3d at 809; *see Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002); *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex. Crim. App. 1993) (en banc).

> Favorable evidence is that which, if disclosed and used effectively, may make the difference between conviction and acquittal. Favorable evidence includes exculpatory evidence as well as impeachment evidence. Exculpatory evidence is that which may justify, excuse, or clear the defendant from alleged guilt, and impeachment evidence is that which disputes, disparages, denies, or contradicts other evidence.

Pena, 353 S.W.3d at 811–12 (citations and internal quotation marks omitted).

To establish materiality, a defendant must show that "in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure." *Id.* at 812 (quoting *Hampton*, 86 S.W.3d at 612); *Webb*, 232 S.W.3d at 115. It is not sufficient to show a mere possibility that the undisclosed information might have helped the defense or might have affected the outcome of the trial. *Pena*, 353 S.W.3d at 812; *Webb*, 232 S.W.3d at 115. "[T]he strength of the exculpatory evidence is balanced against the evidence supporting conviction," and the undisclosed evidence is "considered collectively, rather than item-by-item." *Pena*, 353 S.W.3d at 812.

2) The alleged *Brady* material

The three documents comprising the alleged *Brady* material are (1) a memorandum dated January 4, 2019, from Karen Suarez, a legal assistant and victim assistance coordinator with the district attorney's office; (2) handwritten notes, apparently taken by an investigator with the district attorney's office during an interview, on March 17, 2016, with K.P., the friend that M.R. claimed she disclosed Defendant's misconduct before she told her mother; and (3) a typewritten version of those notes. Suarez states that she came across the Interview Notes on January 4, 2019, while cleaning out the office of an assistant district attorney who had left for other employment. She

believed that the interview memorialized in the notes was conducted by a former investigator who had also previously occupied that office. She immediately notified the district attorney and the assistant district attorney who had prosecuted Defendant's case. Suarez's memo and the Interview Notes were disclosed to Defendant on January 4, 2019, the day they were discovered by Suarez.

The handwritten notes show that, according to K.P., M.R. told her—when they were children—about various incidents in which Defendant had touched M.R. inappropriately. The description of these incidents mirrors the testimony M.R. gave at trial. What differs, however, is that the notes indicate that, according to K.P., M.R. first told her mother about the touching when she was 10 1/2 years old, not when she was 13, as M.R. and her parents had testified at trial. The notes also indicate that K.P. told her own mother and that "mom said she would keep an eye on him." It is not clear from the handwritten notes whether this last statement referred to M.R.'s mother or K.P.'s mother. But the typed version of these handwritten notes more clearly states that, "[M.R.] didn't want to tell her mom because she was afraid. [M.R.] finally told her mom at about age 10 1/2 yrs., and [K.P.] told her mom too. [M.R.'s] mother's response (according to [M.R.] telling [K.P.]) was that she would keep an eye on him, and for [M.R.] to not be alone with him."

3) Failure to disclose

Defendant asserts in his brief that the State intentionally withheld the notes of K.P.'s interview and intentionally misled him concerning K.P.'s potential testimony.[6] The record does not support these assertions of intentional misconduct. Nevertheless, we need not address these assertions because the lynchpin of a *Brady* violation is the State's failure to disclose favorable,

[6] The State, at one point, intended to call K.P. as a witness but ultimately declined to do so because of concerns over her credibility. Defendant did not call K.P. to testify.

material evidence "regardless of the prosecution's good or bad faith . . . ." *Webb*, 232 S.W.3d at 114 (quoting *Hampton*, 86 S.W.3d at 612). It is undisputed in this case that the State did not disclose the Interview Notes until after Defendant was convicted. The next inquiry, then, is whether the evidence is favorable to Defendant.

4) Favorability of the evidence

We first note that the Interview Notes describe several instances of inappropriate touching that would constitute indecency with a child by contact. They do not "justify, excuse, or clear the defendant from alleged guilt," and therefore are not exculpatory. *See Pena*, 353 S.W.3d at 811-12. Perhaps for this reason, Defendant argued in his motion to reconsider only that the evidence is favorable as impeachment evidence.[7] *See id.* at 811 (favorable evidence includes both exculpatory evidence and impeachment evidence).

We agree that, while the Interview Notes are not exculpatory, they do contradict other evidence concerning when M.R. made her first outcry to her mother and, in this regard, may be considered impeachment evidence. *See id.* at 812. Specifically, M.R., Geneva, and Ken all testified that M.R. first told Geneva that Defendant was touching her inappropriately in March or April of 2014, when M.R. was 13 years old. The Interview Notes indicate, though, that M.R. first told Geneva when she was 10 1/2 years old.

The central question now becomes whether this impeachment evidence is material; that is, whether "in light of all the evidence, it is reasonably probable that the outcome of the trial would

[7] Defendant asserts on appeal that the undisclosed evidence is exculpatory, but this assertion is not preserved for our review because it was not included in his motion in the court below. "The trial court cannot be said to have erred in denying a motion for new trial on a basis that was not presented to it." *Keeter v. State*, 175 S.W.3d 756, 760 (Tex. Crim. App. 2005).

have been different had the prosecutor made a timely disclosure." *Id.*

5) Materiality of the evidence

A central theory of Defendant's defense at trial was that Ken Ripley manipulated M.R. to accuse Defendant of criminal wrongdoing so Ken could extort from Defendant a portion of a sizeable monetary settlement Defendant had received for an oilfield injury. Defendant asserted in his motion for reconsideration that the discrepancy concerning when M.R. first told Geneva about Defendant's inappropriate touching is material because "[i]t means that Geneva, and presumably Ken Ripley[,] knew of these allegations long before Defendant's oil field injury, and such knowledge lends credence to Defendant's belief that the accusations against him were brought soley [sic] as part of a scheme to sue Defendant for assets derived from his personal injury." This argument suffers from several flaws.

First, M.R. was born in November 2000, meaning that she would have been 10 1/2 years old in mid-2011. Defendant's oilfield accident occurred in 2011, on the first anniversary of his wedding, during the month of July. The record does not establish, then, that Ken and Geneva were aware of M.R.'s accusations before (or certainly not "long before") Defendant's injury. Presumably, though, Defendant means that they learned of M.R.'s accusations long before Defendant received his personal injury settlement, which occurred sometime prior to M.R.'s 2014 outcry. But that actually cuts against Defendant's theory.

Again, Defendant's theory is that Geneva and Ken coached or persuaded M.R. to make accusations against him because they wanted to extort from him a portion of his personal injury settlement. But the Interview Notes show that M.R. accused Defendant of abuse before he received that settlement (and, perhaps, before he even suffered his injury). In other words, according to the

Interview Notes, M.R.'s outcry occurred before there was any financial incentive to implicate Defendant and, therefore, it could not have been part of any plan by her parents to extort money from Defendant. For this reason, the Interview Notes actually undermine Defendant's theory that the criminal accusations against him are merely part of an extortion plot.

Finally, Defendant pursued his extortion theory at length at trial. He repeatedly questioned Ken about whether he was having financial difficulty in 2013 or 2014, whether Ken had asked Defendant to give or loan him money, and whether Ken and Geneva had planted accusations in M.R.'s mind. Ken vehemently denied ever asking Defendant for money or engaging in any plot to extort money from him. In fact, even Defendant testified that Ken never asked him for money.

Defendant also extensively cross-examined Ken and Geneva about the date of M.R.'s outcry. Ken originally testified that the outcry occurred in March 2014 and that he did not see Defendant after that time. When presented with evidence that he had watched Defendant perform in a musical production in San Antonio in April 2014, and that Defendant had visited Ken and Geneva for Easter weekend, also in April 2014, Ken testified that he must have been mistaken about the March date and that the outcry actually occurred after both April contacts with Defendant. Geneva likewise testified that she had originally reported the outcry as having occurred in March, but that she was not sure about that date. She was sure, though, that the outcry came after the trip to San Antonio to see Defendant perform. Finally, Defendant engaged in a prolonged attempt to impeach M.R. concerning the circumstances and timing of her outcry to her mother.

Defendant offered ample impeachment evidence for the jury to consider against M.R., Geneva, and Ken. *See Webb*, 232 S.W.3d at 115. In light of this abundant impeachment evidence, the slight impeachment strength of the Interview Notes, the fact that the majority of the information

contained in the Interview Notes is inculpatory, and the totality of the evidence supporting conviction, we conclude that it is not reasonably probable that the outcome of the trial would have been different had the State disclosed these Interview Notes. *See Pena*, 353 S.W.3d at 812; *Webb*, 232 S.W.3d at 115. Because we conclude the Interview Notes are not material, we need not address the State's argument that they are hearsay and, thus, not admissible in court. *See Pena*, 353 S.W.3d at 809; *Ex parte Kimes*, 872 S.W.2d at 703 (*Brady* material must be admissible).

We conclude that Defendant has not sustained his burden of establishing that the State's failure to disclose the notes of K.P.'s interview constitutes a *Brady* violation.

Issue One is overruled.

C. Sufficiency of the evidence

Defendant was convicted of two counts of indecency with a child by contact. A person commits that offense if he engages in sexual contact with a child younger than 17 years of age. TEX. PENAL CODE ANN. § 21.11(a)(1). "Sexual contact" means touching, including touching through clothing, any part of the child's genitals, "if committed with the intent to arouse or gratify the sexual desire of any person . . . ." *Id.* at § 21.11(c)(1).

Defendant contends that the evidence is legally insufficient to prove beyond a reasonable doubt that he touched M.R.'s genitals through her clothing. The totality of his argument, though, is that the jury's acceptance of M.R.'s testimony concerning various incidents of such touching is "irrational and unreasonable."

"The jury is the exclusive judge of the credibility of witnesses and of the weight to be given testimony . . . ." *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) (en banc); *accord Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998) (en banc). Thus, the jury was entitled

to believe, and give weight to, M.R.'s accounts of abuse unless no rational jury could have done so. *See Cary*, 507 S.W.3d at 767 (jury's finding of guilt must be rational one in light of all evidence presented at trial).

The State identifies three instances of indecency with a child by contact that support the jury's verdict in this case. In the first instance, M.R. testified that she was in her brother J.D.'s room when Defendant came in, shut the door, and started rubbing her vagina with his fingers, over her clothes. Defendant does not address this instance in his brief, and we find no reason that a rational jury could not have believed M.R.'s testimony concerning it.

M.R. also testified that another instance occurred on her brother John's birthday, when she was younger than 8 years old. Defendant picked her up so that she was facing him with her legs wrapped around him. While holding her, he touched and rubbed her vagina, over her clothes, with his fingers.

Defendant urges that this account is simply unbelievable because other family members were present. But M.R. testified that that was precisely why the incident stood out in her mind. Further, M.R. demonstrated for the jury how Defendant held her with one arm and touched her with his other hand. We cannot conclude from the written record that that demonstration could not have satisfied a rational jury that Defendant was able to hold and fondle M.R. in such a way that it would not be apparent to anyone else. In other words, we cannot conclude that no rational jury could have accepted M.R.'s account of this incident.

The final incident on which the State relies occurred around Christmas 2013. Defendant again picked M.R. up and touched her vagina, over her clothes, while he was holding her. Defendant contends that this account is also unbelievable because, at the time, M.R. was 13 years

old, Defendant had a prosthetic leg, and M.R.'s mother was in the kitchen.

Defendant's Exhibit 1 is a photograph of M.R., Defendant, and Defendant's wife, taken at Easter 2014. That exhibit shows that M.R. is of slight build and barely reaches Defendant's shoulder in height. It is not inconceivable that Defendant could have picked her up and held her as she described. In addition, the jury was able to see both M.R. and Defendant, to gauge their relative sizes, and to assess whether and to what extent Defendant's prosthetic leg would have prevented him from performing the acts M.R. described.

As for M.R.'s mother's presence in the kitchen, M.R. testified that Defendant was holding her as she had previously demonstrated in conjunction with the episode on John's birthday. Again, we cannot say from our written record that that demonstration could not have satisfied the jury that Defendant was able to hold and fondle M.R. without her mother's knowledge. In addition, M.R. testified that she and Defendant were in the kitchen entryway, while her mother was looking at magazines at the kitchen table, "some distance" away.

Viewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could have found beyond a reasonable doubt that Defendant committed at least two acts of indecency with a child by contact. *See Arroyo,* 559 S.W.3d at 487; *Nisbett*, 552 S.W.3d at 262. The evidence is legally sufficient to support Defendant's conviction on counts 5 and 6 of the indictment.

Issue Two is overruled.

CONCLUSION

The trial court did not abuse its discretion by denying Defendant's motion to reconsider his motion for new trial. In addition, the evidence is legally sufficient to support the judgment of

conviction. That judgment is affirmed.

GINA M. PALAFOX, Justice

October 16, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

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