COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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| JOSE MARIA PENA ONTIVEROS, | § | No. 08-20-00100-CR |
| Appellant, | § | Appeal from the |
| v. | § | 109th Judicial District Court |
| THE STATE OF TEXAS, | § | of Crane County, Texas |
| Appellee. | § | (TC# 1765) |

**O P I N I O N**

Appellant Jose Maria Pena Ontiveros was indicted on one count of indecency with a child by contact.[1] A jury convicted Appellant of that count. As per the jury's punishment verdict, he was sentenced to five years' imprisonment and assessed a $10,000 fine. Appellant brings a single issue complaining of the sufficiency of the evidence to support that conviction. Finding no reversible error, we affirm.

## I. FACTUAL BACKGROUND

Appellant was indicted for touching the genitals of D.G, who was eleven years old on the date of the alleged the crime.[2] She made her first outcry when she was fifteen years old. She was eighteen at the time of trial.

[1] *See* TEX.PENAL CODE ANN. § 21.11(a)(1).

[2] To protect the anonymity of the child in this case, we use the same alias assigned to her below, and only make generic references to her family members who testified at trial. *See* TEX.R.APP.P. 9.10(a)(3); *McClendon v. State*, 643 S.W.2d

D.G.'s grandmother lives in Crane and is married to Appellant (who is not biologically related to D.G.). D.G. had known Appellant all her life and she considered him like her grandfather. She spent many of her summers at their house. The event described in the indictment transpired one summer, when she believes she was eleven years old.

On one particular day, her grandmother left the house to run an errand, leaving D.G. and Appellant alone in the house. D.G. had just taken a shower and went to a bedroom to get dressed. D.G. had locked the bedroom door but soon heard Appellant banging on the door and saying, "Why did you lock the door? You don't have anything." She unlocked the door and Appellant came in, expressing that he wanted to put lotion on her. He told her to lay on the bed; she was still unclothed from the shower.[3] Then using his hands, she testified that he put lotion "everywhere . . . even in places that lotion doesn't necessarily belong." D.G. specifically testified this included the "vagina area, private spot" and "bra area."[4] The conduct ended when D.G. said, "Okay, that's fine."

D.G. testified that she was confused by the experience "because your grandpa doesn't do those things, or they shouldn't." In her words, "I didn't understand what had actually happened." And while D.G. usually spent summers with her grandmother, she stopped going after that.[5]

D.G. also testified to additional circumstances following this incident. On several occasions, Appellant would connect his laptop to the television and stream pornographic material to watch with her when they were by themselves at the house. He also showed her pornographic

936, 936 n.1 (Tex.Crim.App. [Panel Op.] 1982).

[3] On cross-examination, she testified that she could not recall whether she had a t-shirt on or not.

[4] On cross-examination, she agreed that she had told others that he actually penetrated her vagina with his finger. On redirect, she added that it "hurt" and she told Appellant to "stop."

[5] On cross-examination, she agreed that she did go back to her grandmother's house, but "it wasn't nearly as much as I used to" and it was no longer for the summers.

images on his phone. Appellant and D.G. would ride horses, and she also testified that twice while helping her onto a horse, he put his hand in her "private spot."

She first reported the incident to her stepfather when she was 14 or 15 years old. D.G. related to him how Appellant would have her watch pornographic material with him and recounted the incident with the lotion. D.G. also told her stepfather that Appellant touched her chest, bottom, and private area. The stepfather also recalled that D.G. said there were several times when she was taking a shower that Appellant tried to walk into the bathroom. He recalled that D.G. was shaking and crying as she related these events. D.G. asked her stepfather not to tell anyone because of her concern for her grandmother's feelings, but after the stepfather consulted with his pastor, they went to the police.[6]

Between the time of the lotion incident and the outcry, D.G. took several family trips where Appellant was present. The family also shared several holidays together. With one exception, however, those gatherings ended after D.G. made her outcry. The family did spend the Thanksgiving immediately following the outcry with Appellant and D.G.'s grandmother, but D.G.'s mother kept a close eye on all the children and never left them alone with Appellant. D.G.'s mother also testified that in looking back on the situation, she realized that D.G. tried to distance herself from Appellant after the reported date of the incident.

The Crane police department interviewed Appellant regarding the allegations. The video of that interview was played to the jury. In the interview, Appellant expressed that he treated D.G. as his own daughter. When confronted with her allegation, he recalled one time when she was sick that he rubbed alcohol on her to lower the fever, but she had underwear on at the time. He

[6] On cross-examination, the stepfather agreed it could have been several months between the date of the outcry and when the police actually got involved. D.G.'s mother testified the outcry was in October, but they went to the police in February of the next year.

denied showing her pornography. He did recall one time that he saw D.G. looking at his computer and she inadvertently saw an inappropriate image that a co-worker had sent to him as joke. He has no criminal history.

Appellant called several witnesses in his defense. He presented his adult daughter, who testified that he never did anything sexually inappropriate as he raised her. She also recalled that when sick, he would rub an alcohol application, like Vicks on her, but never inappropriately. Appellant called two female family friends who spent time with him as they were growing up. They testified that Appellant never did anything nasty, untoward, or indecent toward them. He also called three nieces who likewise were around Appellant while growing up, and never experienced any inappropriate sexual conduct from Appellant.

## II. SUFFICIENCY OF THE EVIDENCE

Appellant's single issue on appeal challenges the sufficiency of the evidence to support his conviction. The Fourteenth Amendment's guarantee of due process requires that every conviction must be supported by legally sufficient evidence. *See Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex.Crim.App. 2010). In a legal sufficiency challenge, we focus solely on whether the evidence, when viewed in the light most favorable to the verdict, would permit *any* rational jury to find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Brooks*, 323 S.W.3d at 912 (establishing legal insufficiency under *Jackson v. Virginia* as the only standard for review of the evidence).

Applying that standard, we recognize that our system designates the jury as the sole arbiter of the credibility and the weight attached to the testimony of each witness. *Metcalf v. State*, 597 S.W.3d 847, 855 (Tex.Crim.App. 2020); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014). Only the jury acts "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Clayton v. State*, 235 S.W.3d 772, 778

(Tex.Crim.App. 2007), *quoting Jackson*, 443 U.S. at 319. In doing so, the jury remains at liberty to believe "all, some, or none of a witness's testimony." *Metcalf*, 597 S.W.3d at 855. When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Dobbs*, 434 S.W.3d at 170; *see also Jackson*, 443 U.S. at 319.

We remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson*." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). However, "[w]e are not to sit as a thirteenth juror reweighing the evidence or deciding whether we believe the evidence established the element in contention beyond a reasonable doubt[.]" *Blankenship v. State*, 780 S.W.2d 198, 207 (Tex.Crim.App. 1988) (en banc). Instead, "we test the evidence to see if it is at least conclusive enough for a reasonable factfinder to believe based on the evidence that the element is established beyond a reasonable doubt." *Id., citing Jackson*, 443 U.S. at 318.

A person commits the offense of indecency with a child if he or she engages in sexual contact with a child who is younger than 17 years and not his or her spouse. *See* TEX.PENAL CODE ANN. § 21.11(a)(1). "Sexual Contact" is defined as "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child," "if committed with the intent to arouse or gratify the sexual desire of any person." *Id.* § 21.11(c)(1). Accordingly, the State had the burden to present evidence sufficient to show beyond a reasonable doubt that Appellant touched the genitals of D.G., a child younger than 17 years, with the intent to arouse or gratify his sexual desire.

Appellant does not identify which element of the offense that he challenges. The gist of his argument, however, is that (1) his lack of any prior criminal history; (2) the lack of inappropriate contact with his own child, several nieces, and family friends; (3) the delay in the

outcry; (4) D.G.'s continued interaction with Appellant for several years following the incident; and (5) his explanation that D.G. misinterpreted his rubbing of alcohol on her to break a fever all negate the jury's finding guilt of beyond a reasonable doubt. We disagree.

Focusing on the elements of the offense, a rational jury could easily conclude that D.G. was under 17 years of age and not married to Appellant. She directly testified that Appellant touched her vagina (and in fact related that he penetrated her). The intent to arouse or gratify the sexual desire of the defendant can be inferred from his conduct, and all surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex.Crim.App. 1981); *Lozano v. State*, 958 S.W.2d 925, 927 (Tex.App.--El Paso 1997, no pet.). Touching the child's breasts, buttocks, and vagina in the circumstances that D.G. described could lead a rational jury to find this element as well. She was in the house alone with him. He pressured his way into a room immediately after she had taken a shower and was undressed. He rubbed lotion in inappropriate places.

Other circumstances also support that this touching was done for sexual gratification. Near the time of this event, Appellant showed D.G. pornographic materials through a computer and on his cell phone. She also believed that he touched her inappropriately when helping her onto a horse. A rational jury could find sufficient evidence for each element of the offense.

We might agree that Appellant raised several arguments, all ably presented at trial, that were directed towards undermining D.G.'s credibility. But on appeal they do little more than ask this Court to reweigh the evidence and make credibility assessments--a task that we are not allowed to perform. *Blankenship*, 780 S.W.2d at 207. Rather, it was the jury's role to accept or reject all or any part of her, and the other witnesses' testimony. *Lovings v. State*, 376 S.W.3d 328, 334 (Tex.App.--Houston [14th Dist.] 2012, no pet.) (rejecting multiple challenges to credibility of sexual assault victim, whose testimony alone was sufficient to support the conviction); *Ramirez v.*

*State*, No. 08-15-00090-CR, 2017 WL 769881, at *4 (Tex.App.--El Paso Feb. 28, 2017) (not designated for publication) (same in indecency with a child case).

From their verdict, we can conclude they believed D.G.'s account beyond a reasonable doubt, and her testimony provided evidence supporting each of the elements of the offense. "A complainant's testimony alone is sufficient to support a conviction for indecency with a child." *Connell v. State*, 233 S.W.3d 460, 466 (Tex.App.--Fort Worth 2007, no pet.); *accord Garcia v. State*, 563 S.W.2d 925, 928 (Tex.Crim.App. [Panel Op.] 1978) (testimony of 17 year old rape victim sufficient); *Duke v. State*, 365 S.W.3d 722, 731 (Tex.App.--Texarkana 2012, pet. ref'd) (child's testimony was sufficient to uphold verdict). *Ramirez*, 2017 WL 769881 at *4 (same). We accordingly overrule Appellant's single issue and affirm the conviction below.

JEFF ALLEY, Justice

February 25, 2021

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

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