Opinion filed March 23, 2017

In The

Eleventh Court of Appeals

No. 11-15-00049-CR

THOMAS OLIVER DAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 238th District Court
Midland County, Texas
Trial Court Cause No. CR42957

M E M O R A N D U M O P I N I O N

Thomas Oliver Day appeals his jury conviction for aggravated sexual assault of a child younger than six years of age. *See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016).[1] The jury assessed his punishment at confinement for a term of

[1]Aggravated sexual assault of a child is a first-degree felony. PENAL § 22.021(e). The punishment range for a first-degree felony is imprisonment for life or for any term of not more than ninety-nine years or less than five years and a fine not to exceed $10,000. *Id.* § 12.32 (West 2011). If the victim of aggravated sexual assault of a child "is younger than six years of age at the time the offense is committed," then the "minimum term of imprisonment . . . is increased to 25 years." *Id.* § 22.021(f)(1).

sixty-five years in the Institutional Division of the Texas Department of Criminal Justice. In a single issue, Appellant argues that the evidence was insufficient to establish that he committed the act of aggravated sexual assault of a child as alleged in the indictment. We affirm.

Background Facts

Appellant's conviction arises from sexual acts alleged to have occurred with R.J., a three-year-old boy. Appellant was seventeen years old at the time the alleged acts occurred. A person commits the offense of aggravated sexual assault of a child if he intentionally or knowingly "causes the penetration of the anus or sexual organ of a child by any means" and the victim is younger than fourteen years of age. PENAL § 22.021(a)(1)(B)(i), (a)(2)(B). The indictment, as amended, charged Appellant with intentionally and knowingly causing the penetration of the anus of R.J., a child younger than six, with a "finger and fingers, and a stick, and a piece of plastic."

Elisha H.[2] testified that Appellant is her husband's nephew. She has two children that live in her home, E.H. and K.H. At the time of the alleged incident, E.H. was ten years old and K.H. was four years old. Crystal J. is Elisha's next-door neighbor and best friend. Crystal has three children, Y.J., R.J., and C.J. At the time of the alleged sexual assault, Y.J. was five years old, R.J. was three years old, and C.J. was less than a year old. Elisha testified that the two families spent a lot of time together. Almost every night, they had dinner together and their children played together.

Elisha testified that during the fall of 2013, Appellant would walk to her house after school around 4:15 p.m. because she lived close to the school. Appellant's mother would pick him up around 7:00 p.m. Elisha stated that Appellant came over

[2]In order to protect the identity of the minors in this case, we will refer to their parents by their first names.

to her house about three times a week. Y.J. and R.J. were frequently at Elisha's house while Appellant was there.

When Appellant was at Elisha's house, he would watch television and play with E.H., K.H., Y.J., and R.J. Elisha stated that there were times when Appellant was inside the home alone with the children. C.J. was at Elisha's house "once or twice" when Appellant was there. Elisha testified that the last couple of days that Appellant was at her house, she noticed that R.J. was fearful of Appellant and that K.H and Y.J. seemed stressed whenever Appellant was around.

Crystal testified that her children interacted with Appellant often. She did not like that Appellant always tried to have the children watch television with him in the bedroom. Crystal stated that, in the fall of 2013, R.J. was normal around Appellant but that eventually it came to a point where R.J. was "sitting on the couch as if he just saw the devil." The day after she noticed R.J. being fearful of Appellant, Crystal told Elisha that her children were not allowed to be around Appellant anymore. Elisha subsequently put a note on her door asking Appellant not to stop by anymore. Appellant stopped going to Elisha's house after she put the note on the door. Crystal's children continued to go to Elisha's house, but they were not around Appellant again.

Around the time Crystal stopped allowing her children to be around Appellant, she began to notice changes in R.J.'s behavior. Crystal stated that these changes in behavior started in September 2013. R.J. became scared of the dark, started to wet the bed, and "started having nightmares . . . where he would scream out in the middle of the night to quit choking him." If Crystal tried to discipline R.J., "he would automatically fall in the fetal position and start screaming to stop choking him." Crystal testified that R.J. was "uncontrollable" and could not be comforted. R.J. was potty-trained, but he began having problems going to the bathroom. R.J.

would defecate in his pants multiple times a day. Crystal stated that R.J. did not exhibit these issues prior to September 2013.

After work one day, Crystal went to Elisha's house, and R.J. had defecated in his pants. Crystal took R.J. home, and when she bent him over to clean him, she noticed he had a bruise almost completely around his anus. She had not seen anything like that before, so she did not suspect anything.

R.J. made an outcry to Crystal during the weekend of November 2, 2013, while the family was in Andrews for a barbeque cook-off. Crystal took eleven pairs of underwear on the trip for R.J., but because he was having so many accidents, she ran out of clean underwear for him by Saturday. As Crystal was washing R.J.'s underwear, she began to cry. R.J. grabbed her and told her, "It's okay, Mama. [Appellant] already put medicine in my bobo." R.J. then told Crystal that "[she] didn't have to be sad anymore, that [Appellant] had put his pee-pee in [R.J.'s] bobo, but [Appellant] had put medicine in there." Crystal testified that R.J. was referring to his anus when he said "bobo" and to Appellant's penis when he said "pee-pee." R.J. also told Crystal that Appellant held R.J. down by the back of R.J.'s neck and put his hand over R.J.'s mouth in the bathroom when he put a "stick" inside of R.J. Crystal testified that Appellant told R.J. not to tell anyone and threatened him.

Upon arriving home from Andrews on Sunday, Crystal asked Y.J. and R.J. to go find the "stick" that R.J. told her about. R.J. went into Elisha's bathroom and opened a container of Monistat cream, which had a white plastic applicator stick. Y.J., R.J., and K.H. then showed Crystal a knife that was located under a recliner in Elisha's house. Y.J. and R.J. testified that Appellant used the knife to threaten them when he told them not to tell anyone what he did to R.J. Elisha recognized that the knife was from her knife block. Crystal then called the police and made a police report.

After reviewing the case, Detective Joe Rogers scheduled a forensic interview for Y.J. and R.J. at the Children's Advocacy Center in Midland. The day after the first interviews were conducted, Y.J. was interviewed a second time. K.H. was interviewed at a later date. Based on the interviews, detective Rogers scheduled a SANE exam for R.J.

Cori Armstead, the sexual assault nurse examiner (SANE) who examined R.J., testified that the bruising Crystal described is not something that is necessarily associated with sexual abuse. However, Armstead stated that an injury would not typically be all the way around the anus. Armstead did not find any trauma on R.J. when she conducted the SANE exam. However, Armstead testified that an applicator stick is not likely to cause lasting injuries, and she was not surprised that the results of R.J.'s exam were "normal."

Detective Rogers attempted to interview Appellant and subsequently obtained a warrant for his arrest. After closing his initial investigation in November 2013, Detective Rogers reopened Appellant's case in August 2014 because Appellant was alleged to have committed an offense against C.J. Based on his investigation into the allegation regarding C.J., Detective Rogers obtained another arrest warrant for Appellant.

During trial, R.J. testified that "private parts" are places on a kid's body that nobody is supposed to look at or touch. R.J. marked the buttocks and genital area on an anatomical drawing of a boy to identify the "private parts" where Appellant touched him. R.J. stated that he was at K.H.'s house in the bathroom when Appellant put a "stick" "in my butt." Appellant then threatened R.J. with a knife and told him not to tell anyone. R.J. said that he had also seen Appellant touch C.J. on her "private part" with his hand.

Y.J. and K.H. both testified that they saw Appellant touch R.J. while they were at K.H.'s house. On an anatomical drawing of a boy, Y.J. identified the

buttocks and genital area, and K.H. identified the buttocks, as the places Appellant touched R.J. Y.J. stated that Appellant called R.J. to the bathroom saying, "Come here. I need to tell you a secret." After R.J. went into the bathroom with Appellant, Y.J. and K.H. heard R.J. screaming and crying, so they went into the bathroom. Y.J. and K.H. saw Appellant putting a "stick" and "medicine" in R.J.'s buttocks. Appellant threatened Y.J. and K.H. and told them not to tell anyone about what they saw. Y.J. also testified that Appellant showed him C.J.'s vagina and buttocks.

R.J. and Y.J. both attended therapy sessions with Maura Callendar. Callendar testified that both boys exhibited signs of trauma. She stated that R.J.'s trouble controlling his bowel movements was not by itself an indicator of sexual abuse; however, it is very common with physical and sexual abuse. R.J. has not told Callendar the whole story about what happened to him. However, R.J. used drawing as a method to articulate the abuse he suffered. In two drawings, R.J. indicated that Appellant assaulted him with a "stick." Y.J. described to Callendar the abuse he witnessed by using stuffed animals. Y.J. represented Appellant and used a stuffed animal to represent R.J. Y.J. grabbed the stuffed animal around the mouth area and said Appellant had his hand over R.J.'s mouth and was bent over R.J. when he put the stick with medicine in R.J.'s buttocks. Y.J. also told Callendar that Appellant "pulled apart [C.J.'s] weenie."

Appellant testified on his own behalf during the guilt/innocence phase. He denied ever touching K.H., Y.J., R.J., or C.J. inappropriately or being alone with them. Appellant stated that he went over to Elisha's house "maybe once" during August and September 2013 but that he never went back once Elisha put the note up asking him not to stop by anymore. Appellant stated that Crystal does not like him, and he believed the children made the allegations because of this fact. However, Appellant admitted to inappropriately touching his younger sister, V.N., who was under 17 years of age at the time, in September 2013.

Analysis

We review a challenge to the sufficiency of the evidence, regardless of whether it is denominated as a legal or factual sufficiency challenge, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.–Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

When conducting a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

Appellant contends that the evidence was insufficient to establish that he committed any act that constituted penetration of R.J.'s anus. We disagree with his assessment of the evidence. R.J. testified that Appellant put a "stick" "in his butt." When we assess the sufficiency of the evidence in cases involving child victims, we cannot expect the child victims to testify with the same clarity and ability that we would expect of a mature and capable adult. *See Villalon v. State*, 791 S.W.2d 130,

134 (Tex. Crim. App. 1990). The Court of Criminal Appeals recognized in *Villalon* that expecting "such testimonial capabilities of children would be to condone, if not encourage, the searching out of children to be the victims of crimes such as the instant offense in order to evade successful prosecution." *Id.* The uncorroborated testimony of a child victim is sufficient to support a conviction for aggravated sexual assault. TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2016); *see Chapman v. State*, 349 S.W.3d 241, 245 (Tex. App.—Eastland 2011, pet. ref'd). Additionally, the jury heard Crystal's outcry testimony. A child victim's outcry statement is sufficient to sustain a conviction for a sexual offense. *Chavez v. State*, 324 S.W.3d 785, 788 (Tex. App.—Eastland 2010, no pet.) (citing *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991)). In addition to R.J.'s testimony, K.H. and Y.J. also testified to witnessing the offense.

Appellant contends that, because he denied committing the alleged acts, the evidence was insufficient to support the verdict. However, "[s]imple denial testimony is insufficient to establish falsity because it is inherently self-serving and unreliable." *Garcia v. State*, 228 S.W.3d 703, 706 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing *Quinn v. Haynes*, 234 F.3d 837, 850 (4th Cir. 2000)). Appellant also asserts that the physical evidence did not establish any injury of the child. Corroboration of the victim's testimony by medical or physical evidence is not required. *Gonzalez Soto v. State*, 267 S.W.3d 327, 332 (Tex. App.—Corpus Christi 2008, no pet.); *see Cantu v. State*, 366 S.W.3d 771, 775–76 (Tex. App.—Amarillo 2012, no pet.); *Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). Although R.J. did not exhibit any signs of physical trauma, Armstead testified that the "stick" was not likely to cause lasting injuries, and she was not surprised that the results of R.J.'s exam were "normal." She stated that more times than not, in cases where there is penetration, injuries will not be found.

Additionally, Appellant argues that R.J. could not identify Appellant as the perpetrator. The State is required to prove beyond a reasonable doubt that the accused is the person who committed the crime charged. *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd) (citing *Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984)). Identity may be proven by direct or circumstantial evidence. *Id.* Here, R.J. identified Appellant when he told Crystal that "Thomas already put medicine in my bobo." K.H. and Y.J. also identified Appellant in their eyewitness testimony of the incident.

Finally, Appellant asserts that he was convicted under a "dump-truck approach" consisting of the extraneous offense allegations that were offered into evidence by the State. Under Article 38.37, section 1, the State is allowed to provide evidence of other instances of sexual assault between the defendant and the victim "for its bearing on relevant matters, including: (1) the state of mind of the defendant and the child; and (2) the previous and subsequent relationship between the defendant and the child." CRIM. PROC. art. 38.37, § 1(b). Under Article 38.37, section 2, the State is allowed to provide evidence of other instances of sexual assault between the victim and other children "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." *Id.* art. 38.37, § 2(b).

The trial court instructed the jury in the court's charge that it could only consider the evidence of extraneous offenses for the purposes set out in Article 38.37, sections 1(b) and 2(b).[3] We presume the jury followed the trial court's instructions in the manner presented, and we will abandon this presumption only if the record contains evidence showing that the jury did not follow the instructions.

[3]We additionally note that the trial court instructed the jury that it could not consider the extraneous acts unless "you find and believe beyond a reasonable doubt" that Appellant committed the extraneous acts. *See* CRIM. PROC. art. 38.37, § 2-a.

See Resendiz v. State, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003); *Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996); *Draper v. State*, 335 S.W.3d 412, 417 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). There is no evidence that the jury did not follow the trial court's instructions. Accordingly, we presume that the jury did not consider the extraneous offense evidence for an improper purpose.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found the elements of the alleged offense beyond a reasonable doubt. We overrule Appellant's sole issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

March 23, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.