Opinion filed October 12, 2017

In The

Eleventh Court of Appeals

Nos. 11-15-00249-CR, 11-15-00250-CR, & 11-15-00251-CR

WILLIAM RANDALL CARNEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 220th District Court
Comanche County, Texas
Trial Court Cause Nos. CR-03788, CR-03789, & CR-03790

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

In each cause, the jury convicted William Randall Carney of the offense of aggravated sexual assault of a child, A.T., and assessed punishment at confinement for fifty years. *See* TEX. PENAL CODE ANN. § 22.021(a)(2)(B) (West Supp. 2016). Appellant presents three issues on appeal. We affirm.

In Appellant's first issue, he asserts that the trial court erred when it admitted portions of A.T.'s grandmother's testimony concerning A.T.'s outcry. In his second

issue, Appellant argues that the trial court erred when it permitted the State to cross-examine one of Appellant's witnesses concerning Appellant's past criminal convictions. In his third issue, Appellant argues that the evidence was factually insufficient to support his convictions.

Appellant dated A.T.'s grandmother for about three months in 2013. While they dated, Appellant lived with A.T.'s grandmother for about three weeks. During that time, A.T. and her little brother stayed with their grandmother. Appellant slept in the same bed as the grandmother, while A.T. and her little brother slept on a couch in the living room.

In August 2014, while A.T. was at her grandmother's house, A.T. told her grandmother that she needed "to tell [her] a secret." A.T. proceeded to tell her grandmother that Appellant "had been touching her, and . . . that he went to the couch when [her little brother] was asleep laying beside her, [and] stuck his finger inside of her." At that point, the grandmother told A.T. that she needed to tell her mother about the abuse. A.T.'s mother then relayed that information to law enforcement.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991). We will reverse a trial court's ruling only if it is outside the "zone of reasonable disagreement." *Id.*

In his first issue, Appellant asserts that the trial court abused its discretion when it admitted portions of the grandmother's testimony that, Appellant alleges, fall outside the scope of Article 38.072 of the Texas Code of Criminal Procedure. Article 38.072 provides an exception to the hearsay rule for outcry testimony in prosecutions for certain offenses. The exception applies if a child makes a statement that describes the alleged offense to a person over eighteen years of age for the first time and if certain prerequisites are met. TEX. CODE CRIM. PROC. ANN. art. 38.072,

§ 2(a), (b) (West Supp. 2016). The provisions of the statute are mandatory and must be complied with in order for an outcry statement to be admissible over a hearsay objection. *Long v. State*, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990).

Appellant does not contend that the State failed to comply with the statutory prerequisites when it offered the outcry statement. His complaint is that the grandmother was allowed to testify beyond A.T.'s description of the offense and that parts of the grandmother's testimony were therefore outside the scope of Article 38.072. Specifically, Appellant alleges that the following portions of the grandmother's testimony fell outside the scope of Article 38.072: A.T. told her grandmother that she did not want her grandmother to tell A.T.'s mother about the abuse because A.T. was afraid she would not be able to stay with her grandmother again; A.T. asked her grandmother if she believed her; A.T. "had tears running down her face"; A.T. was crying; and A.T. did not tell anyone sooner because she was scared.

A trial court does not err when it admits an outcry witness's statements if those statements describe "the circumstances leading up to the outcry statement and its details." *Gottlich v. State*, 822 S.W.2d 734, 737 (Tex. App.—Fort Worth 1992, pet. ref'd), *disapproved of on other grounds by Curry v. State*, 861 S.W.2d 479, 482 n.2 (Tex. App.—Fort Worth 1993, pet. ref'd). The portions of the grandmother's testimony to which Appellant objects do not describe any act of abuse in particular, but are contextual statements that describe the circumstances surrounding A.T.'s outcry. Accordingly, we conclude that the portions of the grandmother's testimony to which Appellant objects describe "the circumstances leading up to the outcry and its details"; therefore, the trial court did not err when it admitted those portions of the grandmother's testimony. *See id.* at 737; *see also Sanders v. State*, No. 10-14-

00211-CR, 2015 WL 2170229, at *2 (Tex. App.—Waco May 7, 2015, pet. ref'd) (mem. op., not designated for publication). Appellant's first issue is overruled.

In his second issue, Appellant argues that the trial court abused its discretion when it allowed the State to cross-examine one of his witnesses regarding Appellant's past criminal convictions. Appellant called Janis Kincade, whose husband employed Appellant, to testify. Kincade testified that she had observed Appellant "on a day in and day out basis" and that he is "generally a respectful type person." She also testified that her children "think[] he's a great guy" and that her daughter thinks Appellant is "normal." At the conclusion of Kincade's testimony on direct examination, the State approached the bench and informed the trial court that the State wanted to cross-examine Kincade regarding some of Appellant's past criminal convictions in order to rebut the false impression Kincade left with the jury that Appellant was a "great" and "normal" person. After the trial court heard arguments and objections outside the presence of the jury, the trial court granted the State permission to question Kincade regarding Appellant's past criminal convictions.

In a criminal case, evidence of a person's character is generally not admissible to prove that conduct conformed to past conduct. *Harrison v. State*, 241 S.W.3d 23, 25 (Tex. Crim. App. 2007); *see* TEX. R. EVID. 404. However, a trial court may admit such evidence if the State offers it to rebut a character trait the accused offers or if the character trait is an essential element to a claim or defense. TEX. R. EVID. 404(a)(1)(A), 405(b). Further, when a defense witness creates a false impression of law-abiding behavior, that "opens the door" to the defendant's otherwise irrelevant past criminal history, and opposing counsel may expose the falsehood. *Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993). Testimony that may normally be inadmissible becomes admissible to correct the false impression the witness left with

the jury. *Prescott v. State*, 744 S.W.2d 128, 131 (Tex. Crim. App. 1988). "Testimony admitted into evidence about a specific 'bad act' must also relate to the issue on which the door has been opened." *Barragan v. State*, No. 10-15-00079-CR, 2016 WL 1274734, at *3 (Tex. App.—Waco Mar. 31, 2016, pet. ref'd) (mem. op., not designated for publication) (citing *Turner v. State*, 4 S.W.3d 74, 79 (Tex. App.—Waco 1999, no pet.)).

On direct examination, Kincade testified that she asked her children about Appellant. Kincade testified that her children thought Appellant was "a great guy" and that her daughter thought Appellant was "normal." Additionally, when asked if Appellant was "generally a respectful type person," Kincade replied, "Always."

Appellant's witness opened the door to rebuttal character evidence when she implied on direct examination that Appellant was "a great guy," "normal," and "respectful." Therefore, the trial court did not abuse its discretion when it permitted the State to cross-examine the witness about Appellant's past criminal convictions. *Harrison*, 241 S.W.3d at 27 ("Under Rules 404 and 405, if the defendant offers evidence of his good character, the prosecution can introduce its own character evidence to rebut the implications of the defendant's character evidence."). Appellant's second issue is overruled.

In his third issue, Appellant argues that the evidence is "factually insufficient" to support all three of his convictions. We note that the Court of Criminal Appeals has held that factual sufficiency no longer applies in criminal cases. *See Brooks v. State*, 323 S.W.3d 893, 902, 912 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (concluding that there is "no meaningful distinction between the *Jackson v. Virginia* legal-sufficiency standard and the . . . factual-sufficiency standard, and these two standards have become indistinguishable" and holding that the "*Jackson v. Virginia* legal-sufficiency standard is the only standard

that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt"); *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *see also Burns v. State*, No. 10-16-00357-CR, 2017 WL 2819116, at *3 (Tex. App.—Waco June 28, 2017, pet. ref'd) (mem. op., not designated for publication); *Sanders*, 2015 WL 2170229, at *1.

We review the sufficiency of the evidence, whether denominated as a legal or a factual sufficiency claim, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks*, 323 S.W.3d at 912; *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we examine all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and any reasonable inferences from it, any rational trier of fact could have found the essential 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). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Brown v. State*, 381 S.W.3d 565, 573 (Tex. App.—Eastland 2012, no pet.) (citing *Jackson*, 443 U.S. at 314, 318 n.11, 320).

A.T. testified that Appellant inappropriately touched her on more than one occasion. A jury may convict on the testimony of a child victim alone. *See* CRIM. PROC. art. 38.07; *see also Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990) (concluding child victim's unsophisticated terminology alone established the element of penetration beyond a reasonable doubt). The State's other witnesses

corroborated A.T.'s testimony. The grandmother testified that A.T. told her that Appellant "stuck his finger inside of her." Tasha Lawson, a therapist at the Eastland County Crisis Center, who provided counseling services to A.T., testified that A.T. had "exhibit[ed] symptoms of . . . trauma." Lawson said that A.T. was fearful, concerned that "other people will want to have sex with" her, and concerned that she was "unable to defend" herself. Additionally, Stacey Henley, a SANE nurse at Cook Children's Medical Center, who examined A.T., testified that some of her findings during the exam "could . . . be indicative of possible sexual abuse." Henley also testified that A.T. told her that Appellant had sexually abused her "a lot of times." We hold that a rational juror could have found beyond a reasonable doubt that Appellant committed three offenses of sexual assault of A.T. Therefore, we hold that the evidence was sufficient to find Appellant guilty of aggravated sexual assault of a child in all three causes. Appellant's third issue is overruled.

We affirm the judgments of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

October 12, 2017

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

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