Opinion filed October 5, 2017

In The

Eleventh Court of Appeals

No. 11-16-00326-CR

BENITO BARRIOZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 106th District Court
Dawson County, Texas
Trial Court Cause No. 13-7316

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

The jury found Benito Barrioz guilty of three offenses from a fifteen-count indictment: Count One for continuous sexual abuse of a child, Count Nine for indecency with a child, and Count Fifteen for sexual assault.[1] After the jury found the enhancement paragraph to be "true," it assessed punishment at confinement for

[1]The State abandoned Counts Two, Three, Four, Five, Six, Seven, Eight, Ten, Eleven, Twelve, and Thirteen prior to trial.

seventy-five years, twenty-five years, and ninety-nine years for Counts One, Nine, and Fifteen, respectively; the trial court sentenced Appellant. On appeal, Appellant asserts a single issue in which he challenges the sufficiency of the evidence for each conviction. We affirm.

I. *The Charged Offenses*

A grand jury returned a multi-count indictment against Appellant for continuous sexual abuse of a child, aggravated sexual assault, indecency with a child, and sexual assault for acts committed against J.T., a child.

A person commits the offense of continuous sexual abuse of a child if, (1) during a period that is thirty or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims, and (2) at the time of the commission of each of the acts of sexual abuse, the actor is seventeen years of age or older and the victim is a child younger than fourteen years of age. TEX. PENAL CODE ANN. § 21.02(b) (West. Supp. 2016). Count One alleged that Appellant, beginning in August 2008 and ending in December 2009, committed continuous sexual abuse of a child, J.T., when he intentionally and knowingly penetrated J.T.'s sexual organ with his fingers; when he intentionally and knowingly, with the intent to arouse and gratify his sexual desire, touched J.T.'s anus; and when he intentionally and knowingly, with the intent to arouse and gratify his sexual desire, touched J.T.'s genitals, during a period that was thirty or more days in duration.

A person commits the offense of indecency with a child, younger than seventeen years of age, whether the child is of the same or opposite sex, if the person engages in sexual contact with the child with the intent to arouse or gratify the sexual desire of any person. PENAL § 21.11 (West 2011). Count Nine alleged that Appellant, in February 2013, committed indecency with a child when he

intentionally and knowingly, with the intent to arouse or gratify his sexual desire, caused a child, J.T., to touch Appellant's penis.

As relevant here, a person commits the offense of sexual assault if the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child, younger than seventeen years of age, by any means or causes the sexual organ of a child younger than seventeen to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor. PENAL § 22.011(a)(2)(A), (C), (c)(1). Count Fifteen alleged that Appellant, in April 2013, committed sexual assault when he either intentionally and knowingly penetrated the sexual organ of a child, J.T., with his sexual organ or intentionally and knowingly caused her sexual organ to come into contact with his sexual organ.

II. *Evidence At Trial*

The victim, J.T., lived with her younger siblings, her mother, and Appellant in Lamesa, Texas. J.T.'s mother dated Appellant. On April 21, 2013, J.T.'s mother awoke early in the morning and noticed the lights were on in the living room and in the kitchen. She also heard squeaking noises coming from the children's room. She opened the door to the children's room and saw Appellant exposed on top of J.T., who was sixteen years old. When she turned on the light in the room, she saw Appellant roll off J.T. Appellant had his shorts rolled down, and his penis was exposed. J.T.'s shorts were around her knees, and her underwear was "rolled off of her too." After J.T.'s mother threatened to call the police, Appellant stated, "I didn't do nothing to her. This is the first time." At that point, J.T.'s mother called the police.

A. J.T. testified about Appellant's sexual abuse of her.

J.T. testified that, on the morning of April 21, 2013, Appellant woke her up by undressing her and inserting his fingers into her vagina; he then climbed on top of her and inserted his penis into her vagina. The previous week, Appellant had told

her to go into another room and lie down—at which point Appellant began to touch her breasts and vagina and then inserted his fingers and penis into her vagina. J.T. testified that Appellant's abuse occurred for years and only stopped for one or two months out of the year.

J.T. explained that the abuse first began when she was about to start sixth grade in 2008. J.T. had helped Appellant clean a house, and Appellant got mad at her, took her into the bathroom of the house, pulled down her pants and underwear, bent her over a toilet, and spanked her hard on her bare bottom. He also pulled on her pubic hair and came in contact with her anus and vagina.

In late 2008, Appellant put a towel over J.T.'s face and touched her vagina to see if she was clean after her shower. J.T. testified that this occurred daily until she was sixteen. She also testified that Appellant made her touch his penis in February or March 2013 in exchange for him allowing her to attend an extracurricular activity. Appellant also would take pictures of her nude or in her underwear in exchange for allowing her to attend extracurricular activities or for not hitting her as a punishment when she did something wrong. All of these events occurred in Dawson County, and most occurred in their home, with the exception of the first instance of abuse.

B. The police conducted an investigation and collected evidence.

Tommy Binford, an investigator with the Dawson County District Attorney's Office, testified about J.T.'s outcry that she made to him during their September 19, 2013 interview. J.T. told him that Appellant began sexually abusing her when she was in the sixth grade. She said that, on or about August 1, 2008, when she and Appellant were working on a house, Appellant pulled her pants down, hit her rear end and vagina, pulled her pubic hair, and made contact with her anus and vagina. On or about December 1, 2008, Appellant opened her vagina with his fingers, and in 2009, Appellant made her lie down on a bed while he touched her vagina with his

fingers. J.T. told Investigator Binford that these acts continued every other day until about December 15, 2009.

J.T. also told Investigator Binford that Appellant made J.T. stroke his penis on or about February 15, 2013, and that he touched her breast with his hands on or about March 15, 2013. J.T. told him that Appellant touched her breast and penetrated her vagina with his penis sometime prior to March 23, 2013, and that Appellant penetrated her vagina with his fingers on or about April 14, 2013. J.T. also explained how Appellant would force her to perform sexual acts before he would let her attend extracurricular activities.

Ariel Rodriguez, an agent with the Texas Alcoholic Beverage Commission and former sergeant with the Lamesa Police Department, went to Appellant's home on the morning of April 21, 2013, took photographs and statements, and collected physical evidence, including two cell phones. John Bentley, an investigator with the Lubbock Police Department, testified that an FBI agent asked him to examine some digital media to determine if it might be child pornography. He analyzed fifteen digital media items and extracted six digital images, which were admitted into evidence, from two cell phones. Six images were photographs of a nude female and an exposed male penis, but Investigator Bentley did not know the individuals' identities. He indicated that, if the female in the images was sixteen years old or younger, those photographs would constitute child pornography. J.T. testified that she was the female in those photographs.

C. J.T.'s medical examination and DNA evidence collected from her indicated sexual abuse by Appellant.

Greg Smith, an ER nurse at Medical Arts Hospital, testified about the assessment that he and the hospital staff performed when J.T. arrived on the morning of April 21, 2013. He said J.T. indicated at the hospital that Appellant had inserted his fingers into her vagina and penetrated her with his penis and that this also

happened when she was younger. Smith also said J.T. told the doctor that Appellant had taken photographs of her. Angela King, a SANE nurse, testified that she performed an exam on J.T. on the morning of April 21, 2013. J.T. told her "that her mother's boyfriend had come into the bedroom, had laid on top of her[,] and had touched her . . . vaginal area, and then had attempted to penetrate her with his penis and she thought that he had actually succeeded." J.T. also told her that Appellant kissed her neck. The exam of J.T. indicated evidence of possible sexual activity.

Amber Miller, a forensic scientist with the Texas Department of Public Safety Crime Laboratory in Lubbock, testified as an expert in DNA analysis. She performed a DNA analysis of swabs from J.T.'s neck, which were "consistent with a mixture of at least two contributors," and determined that Appellant could not "be excluded as the major component in this profile." She also performed an analysis of Appellant's boxer briefs and shorts, which showed a mixture of two individuals, and concluded that Appellant and J.T. could not be excluded as the contributors. Appellant's boxer briefs and shorts tested negative for semen.

III. *Standard of Review*

We apply the sufficiency standard outlined in *Jackson* and its progeny to Appellant's sufficiency complaint. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010). We review all of the evidence in the light most favorable to the jury's verdict and decide whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). The jury is the exclusive judge of the weight and credibility of testimony and is free to draw reasonable inferences from basic facts to ultimate ones. *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003); *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Circumstantial

evidence alone can sufficiently establish guilt, as it is just as probative as direct evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

IV. *Analysis*

Appellant asserts that the evidence was insufficient to convict him of the crimes against J.T. A jury may convict on the testimony of a child victim alone. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West Supp. 2016); *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). J.T. said that Appellant had inappropriately touched her, had made her inappropriately touch him, and had had sexual intercourse with her on several occasions.

J.T. testified that Appellant touched her inappropriately for the first time in August 2008. She testified that Appellant continued to inappropriately touch her whenever she exited the shower. J.T. said that Appellant made her touch his penis in February or March 2013. She also testified that Appellant would take pictures of her nude or in her underwear.

The State's exhibits and numerous witnesses corroborated J.T.'s testimony. J.T.'s mother testified about what she saw the morning of April 21, 2013, as well as what Appellant said to her when she threatened to call the police. King testified that her exam of J.T. revealed evidence of possible sexual activity. Miller testified that neck swabs taken from J.T.'s neck indicated the presence of Appellant's DNA. She also testified that samples from Appellant's boxer briefs and shorts indicated the presence of J.T.'s DNA. The State introduced into evidence photographs showing a nude female and an exposed male penis that Investigator Bentley extracted from two cell phones. J.T. testified that she was the female in those photographs. In addition, Investigator Binford testified about J.T.'s outcry, which can be sufficient

to support a conviction. *See Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991).

Appellant complains that his intent to sexually arouse or gratify himself was never proven for Count Nine; however, his intent can be inferred from words or deeds. "Mental culpability is of such a nature that it generally must be inferred from the ciri9cumstances under which a prohibited act or omission occurs." *Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998) (quoting *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991)). "A defendant's mental state 'was concealed within his own mind and can only be determined from his words, acts, and conduct.'" *Id.* (quoting *Norwood v. State*, 120 S.W.2d 806, 809 (Tex. Crim. App. 1938)). The jury could infer Appellant's intent to sexually arouse or gratify himself when he made J.T. touch his penis in exchange for allowing her to attend an extracurricular activity. We hold that a rational jury could have found beyond a reasonable doubt that Appellant committed the offenses of indecency with a child, sexual assault, and continuous sexual abuse of a child as charged in Counts One, Nine, and Fifteen. We overrule Appellant's sole issue on appeal.

V. *This Court's Ruling*

We affirm the judgments of the trial court.

MIKE WILLSON
JUSTICE

October 5, 2017

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

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