Opinion filed May 17, 2018

In The

Eleventh Court of Appeals

No. 11-16-00121-CR

SHAVONNE SHERRIE INGLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 29th District Court
Palo Pinto County, Texas
Trial Court Cause No. 15825

MEMORANDUM OPINION

The jury convicted Shavonne Sherrie Ingle of aggravated sexual assault of a child and assessed her punishment at confinement for fifty years in the Institutional Division of the Texas Department of Criminal Justice. In five issues on appeal, Appellant contends that (1) the evidence is legally insufficient to support her conviction, (2) the evidence is factually insufficient to support her conviction, (3) the trial court erred in failing to grant a mistrial, (4) the trial court erred in failing to

include a parole instruction in the jury charge, and (5) the trial court erred in admitting hearsay statements. We affirm.

Background Facts

The victim in this case, E.D., is Appellant's daughter. Daniel Ingle[1] is Appellant's husband and E.D.'s stepfather. In 2014, Appellant, Ingle, and E.D. lived in Mineral Wells. Between April and June, Child Protective Services (CPS) placed E.D. with Lori Rios. During this time period, E.D. was two years old.

At some point between April and June 2014, Rios was bathing E.D. when E.D. stated, "Ooh, baby. Ooh, baby. Please touch my p---y." This comment concerned Rios, and she notified CPS. During these three months, E.D. would become excited to speak to Appellant and would answer the phone herself when Appellant called. In June, E.D. returned home.

In January 2015, Appellant called Rios and asked her to again take custody of E.D. during the pendency of a CPS investigation. Rios agreed. E.D. was now three years old. On the day that E.D. arrived in Rios's home, Rios noticed that E.D.'s clothing was too tight, that she was covered in insect bites, that she was in a lot of pain, and that she had a bloody vaginal discharge. Additionally, E.D. would become depressed when told that she would be going to visit Appellant.

In April, CPS informed Rios that E.D. had made an outcry to a CPS caseworker that "somebody" had "bad touched" her. As a result, E.D. began counseling. Rios began to notice that E.D. was sexually "acting out." In June, Rios took a video of E.D. that depicted E.D. simulating sexual intercourse with a large teddy bear by "moving her body up towards the head of the teddy bear."

On July 20, E.D. told her therapist, Tenisha Polk, that Appellant and Ingle had "bad touched" her on her bottom and her vagina. During a subsequent therapy session, E.D. "dictated" a book for Polk to write as a part of her therapy. E.D. titled her

[1]All references in this opinion to "Ingle" are to Daniel Ingle.

"book," "Don't Be Afraid." According to E.D.'s dictation, Appellant told Ingle to "do a bad touch." Specifically, Polk testified that E.D. told her as follows:

> My mom, [Appellant], told [Ingle] to do a bad touch. I felt sad. Don't be afraid of [Ingle] because he did a bad touch to me. I was afraid of him a long time ago. I had powers that helped me not to be afraid. I would cry when he did the bad touch. I was mad that [Appellant] would tell him to do the bad touch. I felt happy when I came to therapy.

Also in July, Appellant called the Parker County Sherriff's Office to report that E.D. had told Appellant that a man named L.M. had sexually abused E.D. Investigator Josh Pitman arranged for the Johnson County Child Advocacy Center (CAC) to conduct a forensic interview of E.D. During the interview, E.D. described the house where the sexual abuse occurred. E.D.'s description did not match L.M.'s house. However, E.D.'s description did match the house at the Mineral Wells address that was listed on Ingle's driver's license. Based on this information, Investigator Pitman believed that Appellant and Ingle were suspects and sent the case to the Mineral Wells Police Department.

Mineral Wells Detective Lloyd Wayne Foley received the case from Investigator Pitman. In August, Detective Foley sent E.D. to Cook Children's Child Advocacy Resource and Evaluation (CARE) Team for a physical exam. Donna Wright, a pediatric nurse practitioner, conducted E.D.'s exam. E.D. used the word "lollipop" to describe male genitalia. E.D. told Wright that Ingle and Appellant had touched her with their hands, that they kissed her on her genitals, that she touched Ingle's "lollipop," and that Ingle stuck his "lollipop" "right here," pointing to her genital area. After additional questioning from Wright, E.D. also stated that she put her mouth on Ingle's "lollipop." Wright noted that there was redness to E.D.'s labia majora that was nonspecific for abuse.

Analysis

In her first and second issues, Appellant contends that the evidence is legally and factually insufficient to support her conviction for aggravated sexual assault of a child. 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 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). 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.

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953

S.W.2d 234, 240 (Tex. Crim. App. 1997)). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.* The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. *See id.*

A person commits the offense of aggravated sexual assault of a child if she intentionally or knowingly "causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor." TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii) (West Supp. 2017). The indictment charged Appellant with intentionally or knowingly causing the sexual organ of E.D., a child younger than six, to contact the mouth of Daniel Ingle. The court's charge instructed the jury as follows:

> The state accuses the defendant of having committed the offense of aggravated sexual assault of a child. Specifically, the accusation is that Daniel Jacob Ingle intentionally or knowingly caused of [sic] the sexual organ of E.D., a child, to contact the mouth of Daniel Jacob Ingle, and that E.D. was a child younger than six years of age, and the defendant is criminally responsible for this offense because the defendant encouraged, directed, or aided, Daniel Jacob Ingle (the primary actor) in committing it.

The application paragraph of the court's charge required the jury to determine if Appellant encouraged, directed, or aided Ingle to commit the offense of aggravated sexual assault of E.D. and if she acted with the intent to assist Ingle to commit the offense.

Under the law of parties, the State is able to enlarge a defendant's criminal responsibility to include acts in which she may not have been the principal actor. *See Ryser v. State*, 453 S.W.3d 17, 28 (Tex. App.—Houston [1st Dist.] 2014, pet.

ref'd) (citing *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996)). A person is criminally responsible for another's conduct if, acting with the intent to promote or assist the commission of the offense, she solicits, encourages, directs, aids, or attempts to aid the other person in committing the offense or, having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, she fails to make a reasonable effort to prevent commission of the offense. PENAL § 7.02(a)(2), (3) (West 2011). A person can be convicted as a party even if the indictment does not explicitly charge her as a party. *Powell v. State*, 194 S.W.3d 503, 506 (Tex. Crim. App. 2006).

During one of her therapy sessions, E.D. told Polk that Appellant told Ingle to "do a bad touch." E.D. described what happened to her in further detail during her physical exam, telling Wright that Ingle kissed her on her genitals. E.D. was also observed simulating sexual intercourse with a teddy bear by "moving her body up towards the head of the teddy bear." According to Wright, this behavior is consistent with what E.D. reported to have experienced.

In asserting that the evidence is legally insufficient to support her conviction, Appellant cites *Taylor v. State*, 268 S.W.3d 571 (Tex. Crim. App. 2008). In *Taylor*, a counselor testified regarding statements made to her by her patient, a child victim of sexual assault. *Id.* at 576–77. The Court of Criminal Appeals held that this testimony was inadmissible hearsay. *Id.* at 590–92. In relying on *Taylor*, Appellant appears to assert that E.D.'s statements to Polk should not be considered in our sufficiency review because they were hearsay. However, when conducting a sufficiency review, we must consider all of the evidence in the record, regardless of whether it was admissible or inadmissible. *Winfrey*, 393 S.W.3d at 767; *Clayton*, 235 S.W.3d at 778. Therefore, we consider E.D.'s statement to Polk that Appellant made Ingle "do a bad touch" to her.

Appellant further asserts that the evidence is insufficient to support her conviction because there is no physical evidence of sexual abuse. Wright testified that the redness that she noted on E.D.'s labia majora was nonspecific for abuse. No other physical evidence was offered. However, there is no requirement that the victim's account be corroborated by medical or physical evidence. *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, 777 (Tex. App.—Amarillo 2012, no pet.) (holding that the testimony of a child victim alone is sufficient to support a conviction for indecency with a child by contact).

Both Polk and Wright testified that E.D. stated that Appellant and Ingle sexually abused E.D. Further, Polk testified that E.D. stated that Ingle abused E.D. at Appellant's direction and encouragement. The jury was free to accept or reject this testimony. Reviewing all of the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. We overrule Appellant's first issue.

Appellant challenges the factual sufficiency of the evidence in her second issue. In *Brooks*, the Court of Criminal Appeals concluded that "there is no meaningful distinction between a *Clewis*[2] factual-sufficiency standard and a *Jackson v. Virginia* legal-sufficiency standard" and held that the *Jackson* 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." 323 S.W.3d at 912. Appellant acknowledges that *Brooks* overruled *Clewis*. However, she contends that the *Clewis* standard should be reinstituted. We decline Appellant's invitation to apply pre-

[2]*Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996).

Brooks factual sufficiency standards to review the sufficiency of the evidence to support her conviction. In the years since *Brooks*, the Court of Criminal Appeals has repeatedly reaffirmed that appellate courts are to apply only the *Jackson* standard in reviewing the sufficiency of the evidence to support a conviction and that courts should not return to applying the factual sufficiency standard. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) ("As the court of appeals properly noted, this Court now applies only one standard 'to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency.'"); *Ex parte Flores*, 387 S.W.3d 626, 641 (Tex. Crim. App. 2012) (noting that court "did away with" factual sufficiency review in *Brooks*). Our determination of Appellant's first issue that the evidence supporting her conviction is legally sufficient under the *Jackson* standard is dispositive of her second issue. We overrule Appellant's second issue.

In Appellant's third issue, she contends that the trial court erred in failing to grant a mistrial after Wright offered opinion testimony regarding the truthfulness of E.D. "A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Id.* at 77.

A witness's direct opinion on the truthfulness of another witness is inadmissible. *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997); *Yount v. State*, 872 S.W.2d 706, 711–12 (Tex. Crim. App. 1993) (op. on reh'g); *Arzaga v. State*, 86 S.W.3d 767, 776 (Tex. App.—El Paso 2002, no pet.). Wright testified that children "[r]arely to occasionally" make false allegations of sexual abuse. She also testified that a three-year-old is not a very skilled liar and that E.D. gave a lot of

details. She testified that it would be "extremely unusual" for a child this age to be able to tell a false story with a lot of detail. This questioning occurred without objection from Appellant over the course of one and one-half pages of the reporter's record. Appellant's trial counsel then objected, stating that "[w]e're getting dangerously close to her making an opinion on the credibility of the child in this case." The State responded, "I won't ask any more questions if we're that close." The trial court sustained Appellant's objection and instructed the jury to disregard the last statement of Wright's testimony. Appellant then asked for a mistrial, which was denied.

We first note that Wright gave at least two responses pertaining to this subject before Appellant lodged an objection. A motion for mistrial must be both timely and specific. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007) (citing *Young v. State*, 137 S.W.3d 65, 65–66 (Tex. Crim. App. 2004)). "A motion for mistrial is timely only if it is made as soon as the grounds for it become apparent." *Id.* A trial court does not abuse its discretion in overruling a motion for mistrial if it is not raised in a timely manner. *See Russell v. State*, 146 S.W.3d 705, 717 (Tex. App.—Texarkana 2004, no pet.).

Appellant contends that she was entitled to a mistrial because the trial court's instruction to disregard Wright's testimony was insufficient to cure the harm it caused. A prompt instruction to disregard will ordinarily cure error associated with an improper question and answer. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). "The law generally presumes that instructions to disregard and other cautionary instructions will be duly obeyed by the jury." *Archie v. State*, 340 S.W.3d 734, 741 (Tex. Crim. App. 2011).

Appellant's trial objection was that Wright's testimony was coming "dangerously close" to offering an opinion on the truthfulness of E.D. Upon hearing this objection, the prosecutor backed away from questioning Wright on this topic.

Therefore, it appears that the trial court acted out of an abundance of caution when it sustained Appellant's objection and instructed the jury to disregard the last question and answer. Because we cannot conclude that Wright's testimony created an undue prejudice that was incurable, the trial court did not abuse its discretion by overruling Appellant's motion for mistrial. We overrule Appellant's third issue.

In Appellant's fourth issue, she contends that the trial court erred in failing to instruct the jury that she would not be eligible for parole. "Appellate review of claims of jury-charge error first involves a determination of whether the charge was erroneous and, if it was, then second, an appellate court conducts a harm analysis, with the standard of review for harm being dependent on whether error was preserved for appeal."[3] *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015) (citing *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012)). Because we conclude that the charge was not erroneous in this case, we do not conduct a harm analysis. *See id.*

Appellant was convicted of aggravated sexual assault of a child under Texas Penal Code Section 22.021. Because the victim was younger than six at the time of the offense, Appellant's offense was punishable under subsection (f) of Section 22.021. PENAL § 22.021(f)(1). This meant that Appellant was not eligible for release on parole. TEX. GOV'T CODE ANN. § 508.145(a) (West Supp. 2017) (prohibiting parole eligibility for defendants convicted of an offense that is punishable under subsection (f) of Section 22.021).

Texas Code of Criminal Procedure Article 37.07, section 4 sets out various jury instructions pertaining to parole law that are to be included in the trial

[3]Appellant neither objected to the court's charge on punishment nor requested the inclusion of an instruction that she was not eligible for parole. Thus, reversal would be required only if the error was fundamental in the sense that it was so egregious and created such harm that the defendant was deprived of a fair and impartial trial. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)).

court's charge to the jury on punishment. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (West Supp. 2017); *see Taylor v. State*, 233 S.W.3d 356, 359 (Tex. Crim. App. 2007). These instructions explain generally the concepts of good conduct time and parole, state the defendant's eligibility for parole in terms of calendar years or sentence portion, and state that no one can predict whether parole or good conduct time might be applied to the defendant. *See Luquis v. State*, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002). However, the requirements of Article 37.07, section 4 do not apply to a conviction arising under Section 22.021 of the Penal Code that is punishable under subsection (f) of that section. *See* CRIM. PROC. art. 37.07, § 4(a); *see also Cross v. State*, No. 09-11-00406-CR, 2012 WL 6643832, at *4 (Tex. App.—Beaumont Dec. 19, 2012, pet. ref'd) (mem. op., not designated for publication). Because Appellant was convicted of an offense under Section 22.021 that is punishable under subsection (f), she was not entitled to an instruction under Article 37.07, section 4. *Cross*, 2012 WL 6643832, at *4.

Appellant contends that the trial court's failure to instruct the jury that she was not eligible for parole violates due course of law and due process. She cites *Luquis* in support of this contention. The Beaumont Court of Appeals addressed a similar contention in *Cross*. The defendant in *Cross* was convicted of continuous sexual assault of a child under Section 21.02 of the Texas Penal Code. *See* PENAL § 21.02. As noted by the court, a conviction under Section 21.02 is similar to a conviction under Section 22.021(f) in that a person convicted of either offense is not eligible for parole under Section 508.145(a) and is not entitled to one of the parole law instructions set out in Article 37.04, section 4. *Cross*, 2012 WL 6643832, at *4.

During the charge conference, the defendant in *Cross* requested that the jury be instructed that he was not eligible for parole. *Id.* The Beaumont Court of Appeals determined that the defendant was not entitled to this instruction. *Id.* The court concluded that, since the legislature had not provided for such an instruction in

prosecutions for continuous sexual abuse of a child, the trial court did not err in refusing the requested instruction. *Id.* The court noted that the Texas Court of Criminal Appeals stated in *Luquis* that "'the Legislature did not want any creative deviations from its chosen language' regarding parole law instructions; consequently, trial judges cannot 'cut and paste as they see fit.'" *Id.* (quoting *Luquis*, 72 S.W.3d at 363). We agree with the reasoning in *Cross*. In the absence of a statutorily required instruction that Appellant was not eligible for parole, the court's charge to the jury omitting this instruction was not erroneous. We overrule Appellant's fourth issue.

In Appellant's fifth issue, she contends that the trial court abused its discretion in admitting hearsay statements made by E.D. to her therapist. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001).

Appellant contends that E.D.'s statements to her therapist that Appellant told Ingle to "bad touch" her are inadmissible hearsay and that they do not fall under the hearsay exception set out in TEX. R. EVID. 803(4) because they were not made with the primary motivation of receiving a medical diagnosis or treatment. *See Powell v. State*, 88 S.W.3d 794, 798–800 (Tex. App.—El Paso 2002, pet. struck). The State responds that Appellant waived this issue because she did not make a specific objection under Rule 803(4) at trial. We first note that Appellant preserved this issue for appellate review by lodging a general hearsay objection. *See Long v. State*, 800 S.W.2d 545, 548 (Tex. Crim. App. 1990) (holding that a general hearsay objection has the requisite specificity to preserve review of a specific hearsay exception).

Hearsay is a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. TEX. R. EVID. 801(d);

Tienda v. State, 479 S.W.3d 863, 874 (Tex. App.—Eastland 2015, no pet.). Hearsay is inadmissible except as provided by statute or the Texas Rules of Evidence. TEX. R. EVID. 802; *Tienda*, 479 S.W.3d at 874. Rule 803(4) sets out a hearsay exception for statements made for medical diagnosis or treatment. *See Taylor*, 268 S.W.3d at 579.

The State offered and the trial court admitted E.D.'s statements to Polk as outcry testimony under 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. *See Robinett v. State*, 383 S.W.3d 758, 761 (Tex. App.—Amarillo 2012, no pet.). 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. CRIM. PROC. art. 38.072, § 2(a), (b). Appellant does not contend that Article 38.072 is inapplicable or that the trial court erred in ruling that the statement was admissible under Article 38.072. Accordingly, we need not address whether the hearsay exception in Rule 803(4) applies because the trial court admitted the statements under another hearsay exception that Appellant has not challenged on appeal. We overrule Appellant's fifth issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

May 17, 2018

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

Panel consists of: Willson, J.,
Bailey, J., and Wright, S.C.J.[4]

[4]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.