Modify and Affirmed as modified; Opinion Filed November 2, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01288-CR

EMMY BACKUSY, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1654232-N

MEMORANDUM OPINION

Before Justices Stoddart, Whitehill, and Boatright
Opinion by Justice Stoddart

A jury convicted Emmy Backusy of aggravated sexual assault of a child younger than fourteen years of age. In four issues, appellant argues the evidence is insufficient to support the conviction, the trial court erred by including a definition of reasonable doubt in the jury charge, the trial court erred by informing the jury about good conduct time, and the trial court lacked jurisdiction to hear the case because it was not transferred to its docket. In three cross issues, the State requests we modify the judgment. We modify the trial court's judgment, and affirm as modified.

FACTUAL BACKGROUND

Appellant is the complainant's stepfather. The complainant, S.P., who was nine years old and in fourth grade at the time of trial, testified appellant came into the bathroom while she was

brushing her teeth, picked her up, and placed her on the toilet seat. He removed her pants and underwear. Using one hand, he touched the "outside" of her "private," which she described as the area she uses to urinate. Using a Kleenex box, S.P. demonstrated for the jury how appellant touched her. She showed he put his fingers on the inside of her skin and testified his fingers then "moved around." He did not insert his finger into her vagina. S.P. then ran away to her bedroom.

On April 22, 2016, S.P. went to a medical clinic with her mother, sister, and uncle. During S.P.'s exam, S.P.'s mother asked the nurse practitioner, Carmen White, to examine S.P.'s private parts because she thought she saw something abnormal on S.P.'s vagina during a bath. White could not see an intact hymen and noticed the opening into S.P.'s vaginal area appeared larger than is common for eight-year-old girls. She did not see any trauma.

When White asked Mother additional questions, S.P. became uncomfortable and "completely pulled her shoulders in." She turned away from White and looked at the wall even though she previously maintained eye contact. S.P.'s reaction added to White's concerns, and White had Mother leave the exam room.

Alone with S.P. and a medical assistant, White asked S.P. whether anyone else ever touched her private parts. S.P. nodded affirmatively and told White her stepfather touched her, but not while bathing her. S.P. said she told Mother about what occurred even though her stepfather threatened to hit her if she told anyone. S.P. was "very emotional" during the conversation. White called CPS.

S.P. told the CPS investigator her stepfather touched her and the investigator referred S.P. for a forensic interview. The investigator instructed Mother that appellant was not to return to the family home, and Mother understood.

When White contacted CPS, appellant was in New Jersey. After learning appellant was not in the home, Detective Blayne Burgess, a child abuse detective with the Dallas Police

Department who was assigned to S.P.'s case, told Mother that appellant should not return to the home during the investigation. Burgess scheduled a forensic interview for S.P. for April 28, 2016. When Burgess called mother on April 28 to confirm she would bring S.P. for the forensic interview, appellant answered mother's phone and said S.P. was at school. CPS removed S.P. from school and took her to the forensic interview.

Megan Peterson, a forensic interviewer at the Dallas Children's Advocacy Center, interviewed S.P. S.P. did not disclose the sexual abuse initially. Peterson testified: "She denied sexual abuse for a very long time in the interview before she made her outcry." After Peterson informed S.P. she knew about the abuse, S.P. became more forthcoming and told Peterson that appellant touched her "private part" with his hand while in the bathroom at their home. S.P. explained appellant took her into the bathroom where he pulled down her pants and underwear. She pulled them back up, and he pulled them back down. Peterson testified: "She talked about how her stepdad with one hand had opened her vagina. She even described that there was skin covering it and that he opened that part of her vagina. She talked about how that hurt and that it made her vagina feel bad." S.P. tried to scream when he assaulted her, but he put his hand over her mouth.

LAW & ANALYSIS

A. Sufficiency of the Evidence

In his first issue, appellant argues the evidence is insufficient to support the conviction, specifically he asserts there is no evidence of penetration of S.P.'s sexual organ. Appellant was charged with aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.021(a)(2)(B). A person commits an offense if he knowingly or intentionally causes the penetration of the sexual organ of another person and the person was younger than fourteen years of age. *See id.* The statute, however, does not require vaginal penetration. *Vernon v. State*, 841 S.W.2d 407, 409 (Tex.

Crim. App. 1992); *Carmond v. State*, No. 05-16-01316-CR, 2018 WL 3135098, at *1 (Tex. App.—Dallas June 27, 2018, no pet.) (mem. op., not designated for publication). Instead, penetration occurs so long as contact with the female sexual organ "could reasonably be regarded by ordinary English speakers as more intrusive than contact with outer vaginal lips." *Vernon*, 841 S.W.2d at 409-10; *see also Carmond*, 2018 WL 3135098, at *1; *Karnes v. State*, 873 S.W.2d 92, 96 (Tex. App.—Dallas 1994, no pet.) ("[t]ouching beneath the fold of the external genitalia amounts to penetration" within the meaning of section 22.021);

We review a challenge to the sufficiency of the evidence in a criminal offense for which the State has the burden of proof under the single sufficiency standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Acosta v. State*, 429 S.W.3d 621, 624–25 (Tex. Crim. App. 2014). Under this standard, the relevant question is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2011). 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. *Id.* Therefore, in analyzing legal sufficiency, we determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Id.* When the record supports conflicting inferences, we presume the factfinder resolved the conflicts in favor of the verdict and therefore defer to that determination. *Id.* Direct and circumstantial evidence are treated equally: circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Id.* A child victim's testimony, standing alone and without corroboration, is sufficient to support a conviction of aggravated sexual assault of a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a), (b)(1).

Using a Kleenex box, S.P. demonstrated for the jury how appellant touched her. She showed he put his fingers on the inside of her skin and testified his fingers then "moved around." S.P. told Peterson that appellant touched her "private part" with his hand while in the bathroom at their home. Peterson testified: "She talked about how her stepdad with one hand had opened her vagina. She even described that there was skin covering it and that he opened that part of her vagina. She talked about how that hurt and that it made her vagina feel bad." Viewing the evidence in the light most favorable to the verdict, we conclude any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We overrule appellant's first issue.

B. Jury Charge

In his second issue, appellant argues the trial court's jury charge erroneously defined reasonable doubt. The jury charge given at the guilt/innocence stage stated: "It is not required that the prosecution prove guilt beyond all possible doubt; it is only required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt." Appellant argues this sentence constituted an impermissible definition of "reasonable doubt." This Court and the court of criminal appeals have rejected this argument. *See, e.g.*, *Mays v. State*, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010); *Woods v. State*, 152 S.W.3d 105, 115 (Tex. Crim. App. 2004); *O'Canas v. State*, 140 S.W.3d 695, 702 (Tex. App.—Dallas 2003, pet. ref'd); *Walker v. State*, No. 05-14-01229-CR, 2016 WL 259577, at *6 (Tex. App.—Dallas Jan. 21, 2016, pet. ref'd) (mem. op., not designated for publication). We do so again today. We overrule appellant's second issue.

In his third issue, appellant asserts the trial court's charge erroneously informed the jury about good conduct time. The charge given during the punishment stage instructed the jury that if appellant were sentenced to a term of imprisonment, he could "earn time off the period of incarceration imposed through the award of good conduct time." This instruction tracked the language of code of criminal procedure article 37.07, § 4(a). *See* TEX. CODE CRIM. PROC. ANN.

art. 37.07, § 4(a). Appellant argues the instruction was erroneous because government code § 508.149 precludes him from receiving any good conduct time credit. Both the court of criminal appeals and this Court have rejected this argument. *See, e.g.*, *Luquis v. State*, 72 S.W.3d 355, 363 (Tex. Crim. App. 2002); *Walker*, 2016 WL 259577, at *6; *Anderson v. State*, No. 05–13–00253–CR, 2013 WL 6870013, at *4 (Tex. App.—Dallas Dec. 31, 2013, no pet.) (mem. op., not designated for publication). We overrule appellant's third issue.

C. Jurisdiction

In his fourth issue, appellant argues the trial court lacked jurisdiction to hear the case and render judgment because the case originally was presented for indictment in a different trial court and no written orders transferred the case to the court that tried the case and rendered judgment. We have rejected this argument as well. *See, e.g.*, *Bourque v. State*, 156 S.W.3d 675, 678–79 (Tex. App.—Dallas 2005, pet. ref'd); *Walker*, 2016 WL 259577, at *6; *Carson v. State*, No. 05–14–00376–CR, 2015 WL 3549779, at *6 (Tex. App.—Dallas June 8, 2015, pet. ref'd) (mem. op., not designated for publication). We overrule appellant's fourth issue.

D. Modification of Judgment

In three cross-issues, the State requests we modify the judgment to reflect appellant was convicted under section 22.021 of the penal code, reflect appellant is required to register as a sex offender and S.P. was eight years old, and add an affirmative finding S.P. was younger than fourteen years old. This Court may modify the trial court's judgment to make the record speak the truth when it has the necessary data and information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W. 2d 26, 31 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W. 2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd).

The judgment fails to provide the statute for the offense and instead simply states "Penal Code." We modify the section titled "Statute for Offense" to show "Penal Code § 22.021."

Appellant was convicted of aggravated sexual assault of a child, an offense that is subject to the sex offender registration requirements of Chapter 62 of the code of criminal procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A). The judgment erroneously states the sex offender registration requirements do not apply and that the age of the victim at the time of the offense is "N/A." We modify the judgment to show that sex offender registration requirements apply and the victim's age was eight years at the time of the offense. *See id.* art 42.01 § 1(27), 62.051.

The code of criminal procedure requires an affirmative finding that the victim of a sexually violent offense was younger than fourteen years of age. *See id.* art. 42.015(b). A "sexually violent offense" includes aggravated sexual assault "committed by a person 17 years of age or older." *Id*. art. 62.001(6). Appellant testified during the punishment phase that he is forty-seven years old. We modify the judgment to reflect a finding that the victim "was younger than 14 years of age at the time of the offense." *See* TEX. CODE CRIM. PROC. ANN. Art 42.015(b).

We sustain the State's first, second, and third cross-issues.

CONCLUSION

We modify the judgment and affirm as modified.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EMMY BACKUSY, Appellant	On Appeal from the 195th Judicial District Court, Dallas County, Texas
No. 05-17-01288-CR V.	Trial Court Cause No. F-1654232-N.
	Opinion delivered by Justice Stoddart.
THE STATE OF TEXAS, Appellee	Justices Whitehill and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The section titled "Statute for Offense," shall be MODIFIED to state "Penal Code § 22.021."

We DELETE the statement "Sex Offender Registration Requirements do not apply to the Defendant" and replace with the statement "Sex Offender Registration Requirements do apply to the Defendant."

We DELETE the term "N/A" following the phrase: "The age of the victim at the time of the offense was," and REPLACE it with the term "8 years old."

We ADD the finding the victim was younger than 14 years of age at the time of the offense.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 2nd day of November, 2018.