Opinion issued February 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00799-CR

NO. 01-09-00800-CR

JEREMIAH JERMAINE JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Case Nos. 1127749 & 1229098

MEMORANDUM OPINION

A jury convicted appellant Jeremiah Jermaine Johnson of compelling prostitution of a juvenile and aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. §§ 22.021 (aggravated sexual assault of a child), 43.05 (compelling

prostitution) (West Supp. 2010). Johnson raises two issues on appeal. In his first issue, Johnson argues that the evidence was insufficient to support his conviction for compelling prostitution, and in his second issue, he argues that the State's improper jury argument requires reversal. Because we conclude that the evidence was sufficient and that Johnson's jury argument complaint was not preserved, we affirm.

I. Background

When she was 13 years old, B.D. ran away from foster care to live with a friend in a vacant apartment, where they would smoke marijuana and "hang out." B.D. and her friend went to a party, and several boys asked B.D. to perform oral sex on them. When she refused, they beat her, and B.D. left in tears. As she walked down the street, Johnson approached and asked her what was wrong. B.D. testified that he told her his name was "Golden" or "Golden Boy." She told him what happened, and he drove her to an apartment, cared for her wounds, and let her take a shower. After she showered, Johnson asked to see B.D. naked, saying, "Let me see what you working with." B.D. obliged.

B.D. testified that Johnson took her to a house, and after he put his young children to bed, B.D. performed oral sex on him. B.D. said that Johnson then asked her to prostitute for him and she agreed. She said that Johnson gave her a receipt from a Sonic restaurant, on which he had written "Golden" and his phone

number, and he instructed her to meet him at the Sonic to give him the money she earned as a prostitute. She testified that Johnson asked her to write down her name, age, and birth date so that if she were arrested he could bail her out. B.D. testified that she initially told Johnson she was 18 years old, but when he questioned her, she told him she was 13 years old. Although B.D. was born in 1993, when she wrote her name and birth date on a match book cover for Johnson, she wrote 1995, erroneously thinking that it would make her appear older.

On the night of August 2, 2007, Houston Police Officer R. Price was working undercover as a member of the Houston Innocence Lost Task Force, a collaboration between local law enforcement and the Federal Bureau of Investigation. Price was driving an unmarked car near the intersection of U.S. Route 59 and Hillcroft Avenue in Harris County when he saw B.D. Believing that she was underage, Price called his partner and approached B.D. in his car. Price parked in a parking lot near the sidewalk where B.D. was walking, rolled down his window, and smiled and waved at her. She walked over to his car, and after a brief conversation, she agreed to have sexual intercourse and perform oral sex on him in exchange for $80.

Price drove B.D. to a motel parking lot and signaled his partner to meet him there. Price pulled into a parking space, and his partner, Officer D. Nieto, parked beside him on the passenger side. Nieto approached the passenger side window,

displaying his police badge. Unaware that Price was a law enforcement officer, B.D. whispered to him, "Tell him that you are my father." Price agreed, asked her age, and learned that she was 13 years old. Price then identified himself as a police officer and told her that she was under arrest.

Price drove B.D. down the street, and Nieto followed them. B.D. told them that she had a pimp and gave them the Sonic receipt with Johnson's phone number. Price called F.B.I. Special Agent P. Fransen, who was also a member of the Houston Innocence Lost Task Force. Fransen met them and asked B.D. to call Johnson and arrange to meet him to deliver some cash. B.D. agreed. Using the phone number written on the receipt, she called him from Fransen's phone, on speaker phone and in front of Price and Nieto. She agreed to meet Johnson at Sonic and give him some money that she said she got from a client. Price and Nieto drove B.D. to the Sonic, where she identified Johnson as the man she knew as "Golden," as well as his car.

Fransen also went to the parking lot. His cell phone rang when Johnson drove up. Fransen noticed that the number was the same number that B.D. had dialed from his phone minutes earlier. He did not answer. Instead, he followed Johnson's car as it left the Sonic parking lot, called for a marked patrol unit to provide backup, and watched as the marked patrol unit stopped Johnson's car at a nearby gas station. Fransen noticed that Johnson was holding a mobile phone

when he got out of his car. He dialed the number on the Sonic receipt, and the phone in Johnson's hand began to ring. After Johnson was handcuffed and taken into custody, Fransen looked at Johnson's phone and saw that his own phone number was the last number called from Johnson's phone.

At trial and without objection, the State introduced a video recording of Johnson's interview with police officers, in which Johnson said that B.D. had performed oral sex on him. Johnson did not testify during the guilt-innocence phase of his trial. Price and Fransen both testified that the location where they met B.D. was in Harris County. B.D. testified that both the apartment and the house where Johnson took her were in Harris County.

II. Sufficiency of the evidence of compelling prostitution

In his first issue, Johnson argues that the evidence was insufficient to prove that he compelled B.D. to engage in prostitution and to prove that the alleged offense took place in Harris County.

"A person commits the offense of compelling prostitution if [he] knowingly . . . causes by any means a child younger than 18 years to commit prostitution, regardless of whether [he] knows the age of the child at the time [he] commits the offense." TEX. PENAL CODE ANN. § 43.05 (West Supp. 2010). Prostitution includes offering to engage, agreeing to engage, or engaging in sexual conduct for a fee. *Id.* § 43.02(a)(1). "[T]he actual commission of the offense of

prostitution is not a prerequisite to the commission of the offense of compelling prostitution." *Waggoner v. State*, 897 S.W.2d 510, 513 (Tex. App.—Austin 1995, no pet.) (citing *Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)).

A. Standard of review

Although Johnson's brief recites now-defunct caselaw suggesting separate standards of review for legal and factual sufficiency, *see Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), his brief did not make distinct arguments pertaining to legal and factual sufficiency or otherwise separate legal and factual sufficiency into separate appellate issues. We therefore treat his challenges to the sufficiency of the evidence, as he does in his brief, in a unified analysis. We review the sufficiency of the evidence to support a criminal conviction to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Viewed in the light most favorable to the verdict, evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See id.* at 314, 318 & n.11, 320, 99 S. Ct. at 2786, 2789 & n.11.

We presume that the fact finder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). On appeal we may not re-evaluate the weight and credibility of the record evidence and thereby substitute our own judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). In reviewing the evidence, 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. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The same standard of review is used for both circumstantial and direct evidence cases. *Id.*

B. Analysis

Johnson argues that the evidence that he compelled B.D. to engage in prostitution is insufficient because B.D. testified that she used marijuana; her testimony was incoherent because her answers were short and responsive to leading questions, as opposed to being in narrative form; and apart from her testimony, only circumstantial evidence connected him to her. Johnson concedes that B.D. was less than 17 years old.

B.D. testified that she had run away from foster care and that Johnson cared for her after she was beaten at a party. She told the jury that he asked to see her naked and asked her to work for him as a prostitute. Officer Price testified that,

while working undercover, B.D. agreed to engage in sexual conduct with him for a fee. He also testified that B.D. told him that she was working for "Golden," whom she later identified as Johnson. She had in her front pants pocket a receipt on which Johnson had written his nickname and a phone number. Johnson had instructed her to meet him at the Sonic restaurant to give him money and then return to the street to solicit more business. B.D. testified that Johnson had asked her for her name, age, and birth date so that he could bail her out if she were arrested. A match book cover upon which she had written this information for Johnson was found in Johnson's car.

B.D. called Johnson in the presence of Price, Officer Nieto, and Agent Fransen. She told Johnson she had $50 from engaging in sexual conduct with a man, and he told her to meet him at the Sonic restaurant. In the Sonic parking lot, B.D. identified Johnson and his car. As for Johnson, when he did not immediately see B.D. in the parking lot, he tried to return her call using the phone number from which she had called him: Fransen's mobile phone. When he was later stopped at a gas station, Fransen dialed the number that Johnson gave B.D., and Fransen witnessed Johnson's mobile phone ringing.

After viewing the evidence in the light most favorable to the prosecution, we conclude that a rational jury could have found beyond a reasonable doubt that Johnson caused B.D., a girl under the age of 18, to engage in prostitution. *See*

Jackson, 443 U.S. at 319, 99 S. Ct. at 2789. Johnson's arguments about B.D.'s drug use and allegedly incoherent testimony are unavailing. These were factors for the jury to consider in assessing B.D.'s credibility and in determining the weight to give her testimony. We are not permitted to reevaluate the weight and credibility of B.D.'s testimony or substitute our judgment for that of the jury. *See Williams*, 235 S.W.3d at 750. Johnson's argument that the evidence linking him to B.D. is merely circumstantial is also unavailing because circumstantial evidence is no less probative than direct evidence and alone may be sufficient to establish guilt. *See Hooper*, 214 S.W.3d at 13.

Finally, Johnson argues that the evidence supporting his conviction for compelling prostitution was insufficient because there was no evidence that B.D. was in Harris County when Johnson asked her to work for him as a prostitute. Venue is not a constituent element of the offense of compelling prosecution that the State was required to prove. *See* TEX. PENAL CODE ANN. § 43.05; *Fairfield v. State*, 610 SW.2d 771, 779 (Tex. 1981) ("Venue is not a 'criminative fact' and thus, not a constituent element of the offense . . . ."); *accord Thierry v. State*, 288 S.W.3d 80, 91 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Failure to prove venue does not negate the guilt of the accused. *Fairfield*, 610 S.W.2d at 779. "Venue need not be proved beyond a reasonable doubt and may be proved by circumstantial as well as direct evidence." *Rippee v. State*, 384 S.W.2d 717, 718

(Tex. Crim. App. 1964). Because venue is not an essential element of an offense, we do not review the sufficiency of the evidence to establish venue under the *Jackson* standard. *Thierry*, 288 S.W.3d at 91. Rather, proof of venue is sufficient if "the jury may reasonably conclude that the offense was committed in the county alleged." *Rippee*, 384 S.W.2d at 718; *see Thierry*, 288 S.W.3d at 91; *see also* TEX. CODE CRIM. PROC. ANN. art. 13.17 (West 2005) (requiring prosecution to prove venue by preponderance of evidence).

The record here contains sufficient evidence that the offense transpired in Harris County. Price and Fransen both testified that they met B.D. in Harris County. B.D. testified that both the apartment and the house where Johnson took her were in Harris County. B.D. agreed to engage in sexual conduct in exchange for money in Harris County, and Johnson instructed B.D. to meet him at a location in Harris County to give him money she told him she obtained in exchange for engaging in sexual activities.

We hold that the evidence was sufficient to support Johnson's conviction for compelling prostitution, and we overrule his first issue.

III. Jury argument

In his second issue, Johnson argues that the State's closing jury argument was improper. In particular, Johnson complains about the following statements that the prosecutor made about how Johnson met B.D.:

> This child who went to C.P.S., who's supposed to, supposed to be her protector, she ran away from C.P.S. She ran away and she went to the St. James apartment, wasn't a good place to be, and then she goes to this party. She goes to this party where we hear about these other guys wanting her to give them oral sex, still holding on to some dignity she says no and for that she gets beat. As she's disheveled, as she walks outside of that apartment, she walks toward the street what happens? We have a predator. We have a predator who is sitting in a car who sees all of a sudden an opportunity, like a snake in the grass, sees an opportunity to strike at fresh meat, and that is what he is.

Johnson's trial counsel objected, stating, "The implication is that something else happened like this crime and there was no evidence in that. He didn't strike at another piece of meat." The trial court overruled his objection. The prosecutor continued, saying, "Every pimp wants fresh meat and he's a pimp and that's what he saw her as. . . . And all for what? . . . So that he didn't have to make an honest living." Johnson's counsel did not object to this statement. On appeal, Johnson asserts, generally, that the prosecutor's statements exceeded the permissible bounds of jury argument. But he specifically argues only that the statements constituted a personal attack, i.e. that Johnson earned his livelihood as a pimp.

"A defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal." *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *see* TEX. R. APP. P. 33.1(a). A defendant also waives his right to complain of error on appeal if his trial objection does not comport with his

objection on appeal. *Curiel v. State*, 243 S.W.3d 10, 19 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

Johnson made no objection to the prosecutor's argument that he coerced B.D. to prostitution so that he did not have to make an honest living. Any objection to that statement is waived. *See Valencia v. State*, 946 S.W.2d 81, 82–83 (Tex. Crim. App. 1997) (holding that court of appeals correctly found waiver when appellant made no objection at trial to State's allegedly improper jury argument). As to the prosecutor's snake-in-the-grass analogy, Johnson's appellate objection is different from his trial objection. At trial he objected on the grounds that the prosecutor's statement suggested, without evidentiary support, that he had previously engaged in behavior similar to the allegations in this case. On appeal, he argues that the prosecutor's statement was a personal attack and suggestive that he earned his livelihood dishonestly. Because his appellate objection does not comport with his trial objection, we hold that Johnson has waived this issue. *See Curiel*, 243 S.W.3d at 19.

We overrule Johnson's second issue.

CONCLUSION

We affirm the judgments of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

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