Opinion issued February 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00905-CR

RAYMOND PROCTOR HARPER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1187992

MEMORANDUM OPINION

A jury found appellant Raymond Proctor Harper guilty of the second degree felony offense of indecency with a child, TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon Supp. 2009), and assessed punishment at four years' confinement and a

$3,000 fine. *Id*. § 12.33. In two points of error, appellant contends that the evidence is legally and factually insufficient to sustain his conviction. We affirm.

BACKGROUND

In July 2008, appellant and his wife Denise ("DeDe") lost their jobs and needed somewhere to live temporarily. They moved into the four-bedroom house that appellant's cousin, Brandon Smith, and his wife, Carrie Prutz, shared with their two children—a 7-year-old daughter and 4-year-old son, B.J.. Smith and Prutz shared a room, appellant and his wife shared another, the children slept in separate beds in the third bedroom, and the fourth room was used as a playroom.

After appellant and his wife had been at the house for a few days, B.J. asked Prutz if he could wear pants to bed. She found this request to be unusual because he usually slept in his underwear, but she agreed. The next day, while B.J. was playing in the playroom with his sister and Prutz, B.J. suddenly declared: "Mommy, Raymond tickled my wiener." After Prutz said "What?," B.J. repeated, "Raymond tickled my wiener." Prutz understood B.J. to mean that this had happened during the previous night, but did not press him for additional information then.

Later that night, Smith confronted appellant, who denied the allegation. The next morning, Smith asked B.J. "what happened," and B.J. said Raymond "touched my wiener." Smith made appellant and his wife move out immediately.

Prutz and Smith did not report the incident to the police. About one week after later, however, a representative from Children's Protective Services (CPS) came to their house and asked to interview the children.[1] When the CPS worker asked Prutz afterwards about whether either child had ever been touched or "messed with," Prutz disclosed the incident with appellant.

At trial, B.J. testified that Raymond and DeDe lived with them the previous summer. He testified that Raymond came in his room one night while he was sleeping, that Raymond touched him on his wiener with his hand, and that it felt "bad." He recalled that he was wearing shorts, and that Raymond put his hand in his pants. He testified this lasted a "short" amount of time.

The Children's Assessment Center's forensic interviewer who spoke to B.J. also testified at trial. She concluded that B.J. could distinguish between a truth and a lie. She testified that B.J. was "very clear" as to what had happened to him, and responded to her questions with very specific details about the incident and surrounding circumstances. She believed his responses were age-appropriate and she did not have the impression that B.J. had been coached.

Both appellant and his wife conceded that identity was not at issue, i.e., that appellant is the same "Raymond" that B.J. said touched him. They testified to their belief, however, that Prutz (possibility jointly with her mother), manipulated B.J.

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[1] There was speculation at trial that Prutz's mother may have called CPS.

into making a false allegation to create an excuse to throw appellant and his wife out of the house.

SUFFICIENCY OF THE EVIDENCE

In two issues, appellant complains the evidence is both legally and factually insufficient to support a conviction for indecency with a child.

A. Standard of Review

An appellate court reviews both legal and factual sufficiency challenges using the same standard of review. *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010); *Ervin v. State*, No. 01-10-00054-CR, __ S.W.3d __, 2010 WL 4619329, at *2-3 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed). Under this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the 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. *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

An appellate court determines 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. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778. An appellate court may not re-evaluate the weight and credibility of the record evidence and thereby substitute its own judgment for that of the fact finder. *Williams*, 235 S.W.3d at 750.

B. Indecency with a Child

A person commits the offense of indecency with a child if, with a child younger than 17 years of age, whether the child is of the same or opposite sex, the person engages in sexual contact with the child or causes the child to engage in sexual contact. TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon Supp. 2009). "Sexual contact" includes "any touching by a person, including touching through clothing . . . any part of the genitals of a child," if "committed with the intent to arouse or gratify the sexual desire of any person." *Id*. § 21.11(c)(1).

C. Sufficiency Analysis

The appellant argues that B.J.'s testimony was too "inconsistent and inconclusive" about "whether appellant touched him." He further complains that B.J. offered scant particulars regarding the alleged encounter and that B.J. was unable to positively identify appellant as his perpetrator. Finally, he contends the record is devoid of any evidence from which the jury could reasonably infer appellant's specific intent in touching B.J. was "to arouse or gratify sexual desire of a person."

The testimony of a child victim alone is sufficient to support a conviction for indecency with a child. TEX. CODE CRIM. PROC. ANN. art 38.07 (Vernon 2005); *Navarro v. State*, 241 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). B.J. testified to the facts necessary to establish the elements of this offense. When asked if someone came into his room at night, B.J. responded "Raymond." When asked if someone touched his "wiener," B.J. said "yes."[2] When asked to identify who touched him, B.J. answered "Raymond." He testified he was wearing shorts and underwear, and that Raymond put his hands in his pants. Finally, he testified that Raymond's touching felt "bad."

The appellant points to several parts of B.J.'s testimony he characterizes at inconsistent and inconclusive, such as B.J.'s testimony that (1) he did not

[2] B.J. identified his wiener as what he uses for "peeing."

remember how he knew it was Raymond that came in his room, (2) he did not wake up when Raymond was in his room, (3) he woke up for just a minute when Raymond came in his room, but does not know what happened in that minute, and (4) he did not see Raymond in the courtroom. But children are not expected to "testify with the same clarity and ability as is expected of mature and capable adults." *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990). It is within the jury's province to weigh the effect of any ambiguities and inconsistencies in this type of testimony. *Tran v. State*, 221 S.W.3d 79, 88 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). B.J.'s testimony established all the elements of indecency with a child, and any inconsistencies in his testimony did not render that evidence insufficient to support the verdict. *Id*.

The testimony of an outcry witness, *see* TEX. CODE CRIM. PROC. art 38.072 (Vernon Supp. 2009), is also alone sufficient to support a conviction for indecency with a child. *See, e.g.*, *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991). As such, Prutz's testimony supports the jury's verdict. Prutz testified that, a few days after the appellant moved into their home, B.J. declared "out of nowhere" that "Raymond tickled my wiener." Prutz heard him repeat the similar statement to his father the following day that Raymond "touched my wiener."

B.J. also adequately identified the appellant. B.J. testified that Raymond and DeDe stayed in their house for a "couple of days." While he said he did not see

Raymond in the courtroom, he was unequivocal in his assertion that the Raymond who stayed with them is the person who came in his room and touched him. *See Purkey v. State*, 656 S.W.2d 519, 520 (Tex. App.—Beaumont 1983, pet. ref'd) (in-court identification of defendant not required). During her testimony, Prutz identified the appellant as the Raymond that was staying in their house at the time of the offense. Both the appellant and his wife conceded at trial that identity was not an issue and that, when B.J. testified about "Raymond," he was referring to the appellant. There is sufficient evidence of identity. *See Rohlfing v. State*, 612 S.W.2d 598, 601 (Tex. Crim. App. 1981).

Finally, there is sufficient evidence that the appellant's touching B.J.'s genitalia was done with the specific intent "to arouse or gratify sexual desire of a person." TEX. PENAL CODE ANN. § 21.11(c)(1) (Vernon Supp. 2009). An individual acts with intent when it is the individual's conscious desire or objective to engage in the conduct or cause the result. *Id*. § 6.03(a) (Vernon 2003). Specific intent to arouse or gratify the sexual desire of any person can be inferred from a defendant's conduct, his remarks, and all the surrounding circumstances. *E.g.*, *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. [Panel Op.] 1981). "An oral expression of intent is not required; the conduct itself is sufficient to infer intent." *Villanueva v. State*, 209 S.W.3d 239, 246 (Tex. App.—Waco 2006, no pet.). B.J. testified that the appellant came into his room at night while he was

asleep, put his hand inside B.J.'s pants and felt his penis. A rational jury could infer appellant had the intent to gratify his own sexual desire from this conduct.

Viewing all evidence in a light most favorable to the verdict, a jury could reasonably find beyond a reasonable doubt each element of the offense of indecency with a child.

CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

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