Opinion issued October 2, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00744-CR

JOSEPH ALLEN URBINO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Case No. 76206-CR

MEMORANDUM OPINION

A jury found appellant, Joseph Allen Urbino, not guilty of two counts of aggravated sexual assault,[1] but found him guilty on one count of the lesser-included

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[1] TEX. PENAL CODE ANN. § 22.021(a)(1)(B) (West Supp. 2017).

offense of indecency with a child.[2] The trial court assessed punishment at twenty years' confinement and a $5,000 fine. In his sole issue, appellant argues that the evidence was legally insufficient to support his conviction of indecency with a child. We affirm the trial court's judgment.

BACKGROUND

A. The Charged Sexual Assaults

In a two-count indictment, appellant was charged with sexually assaulting A.T. and eight-year-old L.T., who are the daughters of appellant's sister, Shelley Valentine. A.T. and L.T. stayed the night at appellant's house on several occasions during the summer of 2014. A.T. and L.T. slept in appellant's bed with appellant and his then girlfriend, Maria. A.T. and L.T. claimed that appellant molested them.

Valentine first heard of the alleged molestation from her ex-boyfriend, Michael Mann. Mann has a daughter—R.M.—with Valentine who sometimes spends time with A.T. and L.T. A.T. testified that she told R.M. about the molestation. R.M. told her father, Mann, that she did not like appellant because he did "nasty things" to A.T. and L.T. Mann relayed this information to Valentine. Valentine then asked A.T. and L.T. if appellant molested them; both girls confirmed that appellant had molested them. Valentine informed the authorities, who investigated the incident. Upon the completion of the investigation, appellant was

[2] TEX. PENAL CODE ANN. § 21.11 (West Supp. 2017)

arrested and indicted for two counts of aggravated sexual assault, one count for each victim.

B. Evidence Presented at Trial

A.T. and L.T. testified that appellant molested them. A.T. testified that appellant touched her on two occasions while she slept in his bed. L.T. testified that appellant touched her under her underwear in her "private spot." She explained that appellant's fingers were inside her underwear and on "the outside" of her vagina. She did not remember whether appellant touched the inside of her vagina.

J. Mink, an investigator in the county sheriff's department, testified that appellant claimed that Maria molested the girls. Mink attempted to locate Maria, but he was unable to do so.

The State presented an audio recording of a phone call between appellant and his mother, Carolyn Ferraro. Appellant denied having touched A.T. and L.T. Ferraro testified that she believed both that A.T. and L.T. told the truth about having been molested and that appellant told the truth about not having molested A.T. and L.T.

Mann, Valentine, Ferraro, Kristin Farmer—the mother of appellant's son, and Catherine Guillory—Farmer's mother—all testified that they never saw any inappropriate behavior between appellant and A.T. and L.T.

C. Conclusion of Trial

At the end of the guilt-innocence phase of the trial, the jury found appellant not guilty of the first count of aggravated sexual assault (of A.T.). The jury also found appellant not guilty of the second count of aggravated assault (of L.T.), but found appellant guilty of the lesser-included offense of indecency with a child, L.T.

LEGAL SUFFICIENCY

A. Summary of Arguments

In his sole issue, appellant contends that the evidence presented at trial is legally insufficient to support a conviction for indecency with a child. The State's case, appellant asserts, rests entirely on L.T.'s testimony and her outcy to her mother. Furthermore, evidence—*i.e.*, the audio recording of appellant's denial of touching A.T. and L.T. and testimony that appellant never acted inappropriately around A.T. and L.T.—was admitted that, if believed, establishes appellant's innocence. *Id.* at 21. No reasonable jury, appellant concludes, could find appellant not guilty of aggravated sexual assault, but nevertheless also find appellant guilty of indecency with a child. *Id.*

The State responds that the evidence admitted at trial supports the jury's implied finding that appellant touched L.T.'s genitals, but that such contact did not constitute penetration. Viewing the facts in the light most favorable to the verdict, the State concludes that a jury reasonably could have found appellant not guilty of

the second count of aggravated sexual assault (of L.T.), but guilty of indecency with a child. *Id.*

B. Standard of Review

For a legal sufficiency issue, we consider all the evidence in the light most favorable to the verdict. *Brooks v. State*, 323 S.W. 3d 893, 902 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319–22, 99 S. Ct. 2781, 2789–92 (1979)). If the jury reasonably could have found all the elements beyond a reasonable doubt, we will not interfere. *Id.*

The jury is the sole judge of the credibility of the witnesses and we do not usurp this role by substituting our judgment for that of the jury. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Accordingly, the jury may choose to believe or not to believe any witness, or any part of their testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

It is the jury's duty to draw reasonable inferences from basic facts to ultimate facts. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789). When we are faced with a record supporting contradicting inferences, we presume that the jury resolved any such conflicts in favor of the verdict, even if not explicitly stated in the record. *Montgomery*, 369 S.W.3d at 192.

C. Applicable Law

A person commits the offense of aggravated sexual assault if:

> [T]he person, regardless of whether the person knows the age of the child at the time of the offense, intentionally or knowingly **causes the penetration of the anus or sexual organ** of a child by any means and the victim is younger than 14 years of age.

TEX. PENAL CODE ANN. § 22.021(a) (West Supp. 2017) (emphasis added).

A person commits the offense of indecency with a child if:

> [W]ith a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the child at the time of the offense, **engages in sexual contact with the child or causes the child to engage in sexual contact.**

Id. § 21.11(a) (West Supp. 2017) (emphasis added).

Sexual contact means:

> [W]ith the intent to arouse or gratify the sexual desire of any person, any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child.

Id. § 21.11(c) (West Supp. 2017).

The testimony of a child victim alone, even if there are conflicts in the testimony, is sufficient to support a conviction for indecency with a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 2005); *Jones v. State*, 428 S.W.3d 163, 169 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Similarly, a child victim's outcry statement alone can be sufficient to support a sexual abuse conviction. *Jones*, 428 S.W.3d at 170.

D. Analysis

Appellant asserts that the evidence admitted at trial is legally insufficient to support a conviction for indecency with a child. We disagree.

Either the testimony of a child victim or of a child victim's outcry statement is alone sufficient to support a conviction for indecency with a child. *Jones*, 428 S.W.3d at 169–70. The jury may choose to believe or not to believe any witness, or any part of their testimony. *Sharp*, 707 S.W.2d at 614. The jury is the sole judge of credibility of the witnesses. *Brooks*, 323 S.W.3d at 902. Although evidence was admitted that, if believed, might support appellant's innocence, the jury was free to believe or disbelieve that evidence. The presence of this evidence does not render other evidence of guilt legally insufficient.

When we are faced with a record supporting contradicting inferences, we presume that the jury resolved any such conflicts in favor of the verdict, even if not explicitly stated in the record. *Montgomery*, 369 S.W.3d at 192. The jury found appellant not guilty of the second count of aggravated sexual assault (of L.T.) but guilty of indecency with a child. Aggravated sexual assault and indecency with a child differ in that the former requires penetration of the anus or sex organ, while the latter requires only sexual contact. L.T. testified that appellant touched her under her underwear, but she stated that she could not remember if appellant touched her inside of her vagina. The jury could reasonably have concluded that appellant touched

L.T.'s genitals under her underwear, but that the touching amounted to sexual contact and not penetration.

Viewing the evidence in the light most favorable to the verdict, we disagree with appellant's contention that no reasonable jury could have found appellant not guilty of aggravated sexual assault, but guilty of indecency with a child. Accordingly, we hold that the evidence is sufficient to support appellant's conviction for indecency with a child.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Brown and Caughey.

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