Opinion issued November 1, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00252-CR

BRIAN HAROLD COOK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1660818

MEMORANDUM OPINION

A jury convicted appellant, Brian Harold Cook, of the offense of sexual assault of a child[1] and assessed his punishment at confinement for 5 years. In his sole issue, appellant contends that the evidence is legally insufficient to support his conviction.

We affirm.

Background

The complainant ("Child") testified that he was fifteen years old when he and his mother ("Mother") moved into appellant's house in 2017.[2] Appellant, who is Mother's second cousin, had undergone knee surgery, and Mother moved in to assist him. Mother also worked various shifts, including some nights, at a Walmart store, and Child stayed with appellant during that time. Child testified that, in July 2017, appellant began encouraging Child to shower with him. Child showered with appellant "multiple times," and appellant "masturbate[d] him in the shower and in the bed." When asked whether the abuse had escalated, Child testified as follows:

> A. Yes, sir. One time it did.
>
> Q. I know it's tough, but can you tell us a little bit about that?
>
> A. One time he was masturbating me and I hadn't finished. So he said that we should try anal and I had told him that he didn't—I didn't want to do it and he just kept encouraging me. So we tried

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1 *See* TEX. PENAL CODE § 22.011(a)(2)(C).

2 To protect the identity of the complainant, we refer to him simply as "Child" and to his parent as "Mother."

it and I had trouble getting it in and once I did, I just immediately went soft and that was it.

Q. What specifically did he ask you to do with your penis?

A. He asked me to put it in his butt.

Q. Did you do that?

A. Yes, sir.

Child testified that Mother had asked him whether anything was occurring between appellant and him, but he denied it because he knew that he and his mother were dependent on appellant and did not have anywhere else to go.

Over time, however, Child began to refuse appellant's advances, and appellant "just got more aggressive, more violent, it would seem." On April 5, 2019, Child argued with Mother and appellant, and appellant made Child leave the house. Child went to a friend's house and stayed overnight. The next day, Mother withdrew Child from school and drove him to stay with his father for the weekend. Father allowed Child to return to the friend's house, and Child attempted to re-enroll himself at school on April 8, 2019. Child testified that Mother and appellant arrived at the school, refused to allow him to re-enroll, and wanted to take Child to his grandparents' house, which Child refused. Law enforcement was called to the school, and Child reported the abuse to the responding officers.

Child testified that the abuse occurred 20 or more times over a six-month period. During cross-examination, Child testified that he could not remember any "birthmarks" or anything "notable about [appellant's] body."

Harris County Sheriff's Office ("HCSO") Deputy J. Russell testified that, on April 8, 2019, he was dispatched to Cy-Fair High School to intercede in a verbal dispute. There, Deputy Russell talked with Child, Mother, and appellant. He noted that Child stated that he did not wish to go with Mother and made an outcry. HCSO Deputy Investigator A. Santana testified that he was dispatched to the school, where he learned about the allegations and reported them to child protection authorities.

Mother testified that, in January 2017, she began visiting appellant, who is her cousin, because he was having difficulty recovering from knee surgery. In June 2017, she and Child moved into appellant's house. She went to work at Walmart, where she worked differing shifts. Appellant, who was a registered nurse, also went back to work. She noted that she was financially dependent on appellant and that he provided for her and Child from 2017 to 2019. She testified that Child had his own bedroom and that the rooms and bathrooms were in close quarters. She agreed that appellant and Child were alone together while she was at work. Although she denied any possibility of inappropriate contact between appellant and Child, she admitted having previously asked Child about any such contact.

Defense counsel also presented the testimony of two witnesses with whom appellant had had a dating relationship. They each testified that appellant has a distinct birthmark on his penis.

Sufficiency of the Evidence

In his sole issue, appellant argues that the evidence is legally insufficient to support his conviction because the evidence fails to establish "that the complainant's penis contacted appellant's anus, as alleged in the indictment."

Standard of Review and Applicable Law

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We give deference to the responsibility of the factfinder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *Williams*, 235 S.W.3d at 750. The jury, as the sole judge of the facts and credibility of the witnesses, may choose to believe or disbelieve any witness or any portion of their testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Our role is that of a due process safeguard, and we consider only whether the factfinder reached a rational decision. *See Malbrough v. State*, 612 S.W.3d 537, 559 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd); *see also Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016) (observing that reviewing court's role on appeal "is restricted to guarding against the rare occurrence when a fact finder does not act rationally").

A person commits the offense of sexual assault of a child if the person "intentionally or knowingly . . . causes the sexual organ of a child to contact or penetrate the . . . anus . . . of another person, including the actor." TEX. PENAL CODE § 22.011(a)(2)(C). "Child" means a person younger than 17 years of age. *Id.* § 22.011(c)(1). A person acts intentionally when it is his conscious objective or desire to engage in the conduct. *Id.* § 6.03(a).

Analysis

Here, Child testified that, in 2017, while Child was fifteen years old, appellant directed that Child put his penis "in [appellant's] butt" and Child complied. A conviction under section 22.011 "is supportable on the uncorroborated testimony" of a complainant.[3] *See* TEX. CODE CRIM. PROC. art. 38.07(a); *Bryant v. State*, 340 S.W.3d 1, 14 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (holding child complainant's testimony, standing alone, sufficient to support conviction for sexual assault of child); *Bargas v. State*, 252 S.W.3d 876, 888 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Thus, based on Child's testimony alone, the jury could have reasonably concluded that appellant intentionally caused Child's sexual organ to contact appellant's anus. *See* TEX. PENAL CODE §§ 6.03(a), 22.011(a)(2)(C), (c)(1).

[3] The additional requirement that the complainant inform another person of the offense within one year after the offense is alleged to have been committed does not apply when, as here, the complainant was under age seventeen at the time of the offense. *See* TEX. CODE CRIM. PROC. art. 38.07(b)(1).

Appellant argues that the evidence is insufficient because "there is a clear distinction between the flesh of the buttocks and the anus," and the State "failed to elicit what part of the body 'it' referred to, or that [Child's] penis contacted appellant's anus."

In *Martinez v. State*, the defendant raised a similar argument. No. 14-03-00596-CR, 2004 WL 1153682, at *2 (Tex. App.—Houston [14th Dist.] May 25, 2004, pet. ref'd) (mem. op., not designated for publication). There, the child complainant testified that the defendant forced her to engage in "anal sex," which she described as: "It was in my butt his—his penis in my butt." *Id.* The court noted that the "word 'anal,' by its definition, indicates that the act involved the anus, not merely the buttocks." *Id.* And, the jury was not constrained to strict definitions. *Id.* (citing *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992) ("Words not specially defined by the Legislature are to be understood as ordinary usage allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance.")). The court held that the "jury could have rationally concluded that 'in my butt' indicated penetration," as charged in the indictment. *Id*. at *1–2.

Here, the record shows that Child testified that appellant stated "we should try anal" and directed that Child put his penis "in" appellant's "butt," and that Child complied:

A. . . . . So he said that we should try anal and I had told him that he didn't—I didn't want to do it and he just kept encouraging me. So we tried it and I had trouble getting it in and once I did, I just immediately went soft and that was it.

Q. What specifically did he ask you to do with your penis?

A. He asked me to put it in his butt.

Q. Did you do that?

A. Yes, sir.

The jury could have rationally concluded that "in his butt" indicated contact with appellant's anus, as charged in the indictment. *See* TEX. PENAL CODE § 22.011(a)(2)(C); *see also Martinez*, 2004 WL 1153682, at *2.

Appellant also argues that the evidence is insufficient because "the defense admitted indisputable proof that appellant has a distinct birthmark on his penis that [Child] could not identify and even denied was present."

The record does not support appellant's argument. The record shows that Child stated only that he could not "remember" any identifying marks:

Q. And, so, the identifying marks on [appellant] that you told us about are what?

A. There—his scars on his lower back and then he has a tattoo on his lower back, as well.

Q. Okay. Any other identifying marks?

A. I can't remember.

Q. Nothing stands out?

A. No, sir.

It was within the province of the jury to judge the credibility of the witnesses and to resolve any conflicts in the testimony. *See Williams*, 235 S.W.3d at 750; *Sharp*, 707 S.W.2d at 614. And, the jury could consider that five years had passed between the time of the events at issue and Child's testimony.

Viewing the evidence in the light most favorable to the verdict, we conclude that the jury could have reasonably concluded that appellant intentionally caused the sexual organ of a child to contact the anus of appellant. *See* TEX. PENAL CODE § 22.011(a)(2)(C); *Williams*, 235 S.W.3d at 750. Accordingly, we hold that the evidence is legally sufficient to support appellant's conviction for sexual assault of a child.

We overrule appellant's sole issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Landau and Hightower.

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