Affirmed and Memorandum Opinion filed March 11, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00839-CR

HUGO PAUL AYALA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1115224

MEMORANDUM OPINION

Appellant Hugo Paul Ayala was convicted of indecency with a child by exposure. After a finding of "true" to two enhancement paragraphs, the jury sentenced appellant to life imprisonment. In two issues, appellant contends that the evidence is legally and factually insufficient to sustain his conviction. We affirm.

I. BACKGROUND

After the school day ended on November 16, 2006, the complainant, twelve-year-old D.N., left school and waited for her mother. She walked a short distance from the school and sat on a bench, which faced a park and playground area next to the school where several children were playing. D.N. noticed a pick-up truck in the street directly behind the bench where she was sitting. D.N. saw a man in the driver's seat and noticed his hands moving up and down from his mid-section. D.N. determined that the man was masturbating. She became scared and started walking back to the school when she saw A.A., a classmate, leaving the school. D.N. told A.A. she saw a man masturbating in the truck. A.A. walked to the bench and also observed the man masturbating in the truck. The two girls re-entered the school and told the principal about the man in the truck. The principal gave A.A. a notepad and told her to write down the truck's license plate number. D.N.'s mother had arrived by this time, and D.N. told her mother what she saw. D.N. and her mother searched unsuccessfully for the truck. A.A. returned to the bench, but the truck was no longer there. A.A. sat on another bench outside the school and noticed the truck return and park in the same spot as before. She went back to the school and informed the principal, who went outside and talked to the driver. The driver told the principal he was "waiting for a niece or a daughter," but left without retrieving a child. The police were notified of the incident. Several months later, appellant's photograph was placed in a photo array, taken to the school, and shown to D.N. and A.A. After this meeting with the girls, appellant was indicted for indecency with a child by exposure and arrested. After a jury trial, appellant was convicted of the charged offense.

In his first issue, appellant contends the evidence is legally insufficient to support his conviction for indecency with a child because the State failed to prove that he exposed his genitals knowing D.N. was present. In his second issue, appellant maintains the evidence is factually insufficient to sustain his conviction for the offense charged.

II. ANALYSIS

A. Legal Sufficiency of the Evidence

In reviewing a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). As the trier of fact, the jury "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The jury may also draw reasonable inferences from basic facts to ultimate facts. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). We presume that when faced with conflicting evidence, the jury resolved conflicts in favor of the verdict. *See Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

To prove indecency with a child by exposure in this case, the State was required to prove: (1) the child victim was younger than seventeen years and not the spouse of the accused, (2) the accused exposed any part of his genitals, (3) knowing the child was present, (4) with intent to arouse or gratify the sexual desire of any person. TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (Vernon 2003);[1] *Breckenridge v. State*, 40 S.W.3d 118, 128 (Tex. App.—San Antonio 2000, pet. ref'd).

Appellant argues there is no evidence showing he knew either D.N. or A.A. were present while he allegedly masturbated, and thus the State failed to prove this element of the offense. Officer Susan Courtney McAllister, the Houston Police Department officer who investigated the incident, testified that during interrogation, appellant admitted to driving the truck, knowing the location of and previously being outside the school where

[1] Texas Penal Code section 21.11 was amended after appellant's trial, but the relevant elements of the offense have not been substantively altered. *See* Act of May 30, 2009, 81st Leg., R.S., ch. 260, § 1, 2009 TEX. SESS. LAW SERV. 709, 709 (Vernon) (to be codified as an amendment to TEX. PENAL CODE ANN. § 21.11).

the incident occurred, and at times masturbating inside the truck. He denied masturbating in the truck on the date of the offense. At trial, D.N. identified appellant as the man she saw masturbating inside the truck. She stated that the truck's windows were tinted and the driver's window was closed, but the passenger window was down and she could see inside the truck. Although D.N. did not see appellant's genitals, she saw his hands moving up and down from "his private part" and concluded he was masturbating. A.A. also testified for the State and identified appellant as the man in the truck. A.A. stated she looked through the open passenger window and saw appellant's "middle part laying against the steering [wheel] and his hand moving up and down." She agreed that appellant's "middle part" was his penis, and stated that after a short while "[s]tuff came out, like, on the steering wheel."

The fact-finder may infer knowledge of a child's presence from the conduct of, remarks by, and circumstances surrounding the acts engaged in by an accused. *Turner v. State*, 600 S.W.2d 927, 929 (Tex. Crim. App. [Panel Op.] 1980); *Wilcox v. State*, 672 S.W.2d 12, 13 (Tex. App.—Houston [14th Dist.] 1984, no pet.). From the testimony at trial, the jury could have inferred that appellant knew the girls were present while he masturbated. Appellant admitted he was familiar with the school's location, and that he had previously masturbated in the truck. When the girls saw the vehicle, it was parked across the street from a park located next to the school. Both girls testified other children were leaving the school at the time and that a number of children were playing in the park. The jury could reasonably have inferred that appellant had knowledge of children walking along the sidewalk from the school to the park, and thus knew that D.N., the named complainant, was present. *See Turner*, 600 S.W.2d at 930–31 (holding the jury could properly infer knowledge of child's presence where defendant stopped his vehicle and exposed himself after driving past child as she walked); *Wilcox*, 672 S.W.2d at 13–14

(finding sufficient evidence to show awareness of complainant's presence where appellant exposed himself by a gap in a fence close to where children were playing).[2]

Appellant also asserts there is no evidence he called attention to himself by speaking or gesturing to the girls; thus, appellant contends, the State failed to prove he had knowledge of the girls' presence. D.N. and A.A. testified that appellant did not speak to them or appear to look at them while masturbating; rather, his attention was directed towards a group of children playing in the park next to the school. While words or deeds inviting a child to view appellant's genitals suggest knowledge of a child's presence, active attention-getting conduct is not a prerequisite for conviction. *See Turner*, 600 S.W.2d at 930; *Ercanbrack v. State*, 646 S.W.2d 480, 481–82 (Tex. App.—Houston [1st Dist.] 1982, no pet.). Such acts are merely evidentiary and not an element of the offense. *See Turner*, 600 S.W.2d at 930. Appellant also argues that there is no evidence the girls were near his truck when he exposed his genitals because there was no testimony describing his penis. The State is not expressly required to elicit testimony describing the accused's genitals. *See Breckenridge*, 40 S.W.3d at 128 (stating that section 21.11(a) does not require proof that the victim actually saw the accused's genitals); *Uribe v. State*, 7 S.W.3d 294, 297 (Tex. App.—Austin 1999, pet. ref'd) (same). After hearing D.N. testify that she saw appellant's hands moving up and down from his mid-section and A.A. state that she saw appellant's penis resting on the truck's steering wheel, the jury could have found that appellant's genitals were exposed without being given a physical description of his genitals.

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[2] *See also Williams v. State*, No. 05-08-00376-CR, 2009 WL 1981843, at *3 (Tex. App.—Dallas July 10, 2009, pet. ref'd) (mem. op., not designated for publication) (finding appellant had knowledge of complainant child's presence while exposing himself from behind fence next to pool area where several children were swimming, despite fact that appellant did not look directly at complainant while exposing himself); *Chapman v. State*, No. 01-05-00923-CR, 2006 WL 3316705, at *3 (Tex. App.—Houston [1st Dist.] Nov. 16, 2006, no pet.) (mem. op., not designated for publication) (holding evidence was sufficient to support appellant's conviction when complainant observed appellant masturbating through bookshelves in childrens' section of public library, although appellant did not know complainant could see him); *Montoya v. State*, No. 07-02-0247-CR, 2003 WL 397766, at *3 (Tex. App.—Amarillo Feb. 21, 2003, pet. ref'd) (mem. op., not designated for publication) (affirming finding of appellant's knowledge of complainant's presence where appellant exposed his genitals in presence of children at a public park, despite not making eye contact with complainant).

After viewing the evidence in the light most favorable to the verdict, we determine that a rational juror could have found appellant had knowledge that D.N., the complainant, was present when he exposed his genitals. We overrule appellant's first issue.

B. Factual Sufficiency of the Evidence

When conducting a factual sufficiency review, we view all the evidence in a neutral light and will set aside the verdict only if we are able to say, with some objective basis in the record, that the conviction is clearly wrong or manifestly unjust because the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State*, 204 S.W.3d 404, 414–17 (Tex. Crim. App. 2006). We cannot declare that a new trial is justified because we disagree with the jury's resolution of a conflict in the evidence, and we will not intrude upon the fact-finder's role as the sole judge of the weight and credibility of witness testimony. *See id.* at 417; *Fuentes*, 991 S.W.2d at 271–72. The fact-finder may choose to believe all, some, or none of the testimony presented. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *In re A.B.*, 133 S.W.3d 869, 872 (Tex. App.—Dallas 2004, no pet.). In our review, we discuss the evidence appellant claims is most important in allegedly undermining the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003). If we determine the evidence is factually insufficient, we must explain in exactly what way we perceive the conflicting evidence to greatly preponderate against conviction. *Watson*, 204 S.W.3d at 414–17.

Appellant argues the evidence is factually insufficient because the testimony of D.N. and A.A. was "uncorroborated, inconsistent and riddled with holes and instances of convenient memory loss." Both girls testified that they went to the principal's office and told the principal that they saw appellant masturbating. D.N. named the principal as a Mr. Rodriguez, while A.A. claims she told a Ms. Medina. There was also an inconsistency as to whether A.A. was twelve or thirteen years old at the time of the offense. It is the fact-finders' duty to determine if these inconsistencies or contradictions impugned the

witness's credibility, and we may not intrude upon their judgment in these matters. *See Watson*, 204 S.W.3d at 417; *Fuentes*, 991 S.W.2d at 271.

Appellant also contends D.N. and A.A. could not have seen inside his truck from a distance of six to eight feet away. At trial, appellant's counsel conducted a demonstration by asking D.N. to stand approximately seven feet from the jury box and state whether she could see what the jurors were doing with their hands. She admitted she could not see any of the jurors' hands behind the box. Appellant contends this shows she could not have seen inside the truck. However, there was photographic evidence and testimony that the girls were standing on a slight incline above a curb, and were thus able to see inside the truck. Appellant further claims the State should have called the principal as a witness to corroborate the girls' stories and that D.N.'s mother should have testified about her daughter's demeanor after the incident occurred. The uncorroborated testimony of a child victim, standing alone, is sufficient to support a conviction for indecency with a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 2005); *Sansom v. State*, 292 S.W.3d 112, 122–23 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *Navarro v. State*, 241 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). D.N. and A.A. testified they saw appellant's exposed genitals. This testimony is sufficient to convict appellant. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 2005). Notwithstanding any alleged weaknesses or inconsistencies with the girls' testimony, the jury is the sole judge of the credibility of the witnesses and of the strength of the evidence. *See Fuentes*, 991 S.W.2d at 271. According to the verdict, the jury believed the testimony of D.N. and A.A.

Having evaluated all the evidence in a neutral light, we cannot say with some objective basis in the record that the jury's verdict is clearly wrong, manifestly unjust, or contradicted by the great weight and preponderance of the evidence. We overrule appellant's second issue.

III. CONCLUSION

The evidence presented by the State is legally and factually sufficient to support the jury's finding that appellant was guilty of indecency with a child. Accordingly, we overrule each of appellant's issues and affirm the judgment of the trial court.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Frost, and Brown.

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