Affirmed and Memorandum Opinion filed July 6, 2010.

In The

Fourteenth Court of Appeals

NOS. 14-09-00396-CR
14-09-00397-CR

PATRICK GEORGE MERRITT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause Nos. 1135383 & 1135384

MEMORANDUM OPINION

A jury convicted appellant Patrick George Merritt of aggravated sexual assault of a child in cause number 1135383 and assessed appellant's punishment at 20 years' confinement. The jury also convicted appellant of aggravated sexual assault of a child in cause number 1135384 and assessed appellant's punishment at 17 years' confinement. The trial court ordered that the sentences be served concurrently. Appellant appeals

contending (1) the evidence is legally and factually insufficient to support the jury's verdict; and (2) the trial court erred in its instructions to the jury. We affirm.

Background

Appellant regularly babysat for the complainant N.O.,[1] an 11-year old girl, in 2006 and 2007. N.O. lived with Leah Spencer, her legal guardian. On several occasions, Spencer or a neighbor found appellant and N.O. in the upstairs bedroom of Spencer's home with the door locked. In September 2007, N.O. told Spencer that appellant "[held] her down in the bedroom upstairs while the door was locked . . . he kissed her using his tongue . . . [and] he put her over the bed stomach down and would go through her panties from behind, and back up to where he needed to be." N.O. told Spencer that this happened "more than three times," and that appellant told N.O. not to tell anyone. Spencer immediately called the police.

Appellant was indicted on two counts of aggravated sexual assault of a child. At trial, N.O. testified that appellant first made her uncomfortable by putting his hands on her shoulders. The physical touching led to "wrestling," during which appellant would push N.O. onto the floor and pretend to strangle her. Appellant then began to kiss N.O. on the cheek and tried to move towards her mouth. N.O. testified that while she and appellant were upstairs with the door locked, appellant would "lay [her] down on the bed," after which he "flipped [her] over . . . [a]nd held her down and got his hand and put it into [her] panties and he — squeezed [her] butt cheeks and he tried to go towards the front." N.O. further testified that appellant "wiggled" his hand around while his hand was in her panties, and that he "went kind of towards the front but not all the way at first." When asked what part of her body appellant touched, N.O. replied that it was "not all the way in the front but it's kind of in the middle of the front and your butt." The reporter's record reflects that N.O. nodded her head affirmatively when asked if appellant put his fingers "between

[1] To protect the child victim's identity, she is referred to as "N.O."

where [she] use[d] the restroom and where [her] bottom is." The prosecutor noted, "And I see just for the record she's nodding her head up and down." When asked if appellant's fingers would go in between "the two pieces of skin that are down there where [she] use[s] the restroom," N.O. replied "Huh — kind of sort of." When asked again if appellant's finger would be "in between those two pieces of skin," N.O. replied "Uh-huh."

The jury found appellant guilty as charged in the indictment and assessed punishment at confinement for 20 years in cause number 1135383 and 17 years for cause number 1135384. The trial court signed its judgment on April 22, 2009, in each cause number. Appellant timely appealed the trial court's judgments.

Analysis

Appellant presents four issues on appeal. In his first two issues, appellant contends that the evidence is legally and factually insufficient to support his conviction for aggravated sexual assault of a child. In his third and fourth issues, appellant contends that the trial court erroneously instructed the jury regarding the terms (1) "penetration;" and (2) "female sexual organ." We address each in turn.

I. Legal and Factual Sufficiency

In reviewing the legal sufficiency of the evidence, an appellate court examines all of the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found proof of the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Rollerson v. State*, 227 S.W.3d 718, 724 (Tex. Crim. App. 2007). The court does not sit as a thirteenth juror and may not re-evaluate the weight and credibility of the record evidence or substitute its judgment for that of the factfinder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

Reconciliation of conflicts in the evidence is within the exclusive province of the factfinder. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). The

appellate court's duty is not to reweigh the evidence, but to serve as a final due process safeguard ensuring only the rationality of the factfinder. *See Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). An appellate court faced with a record that supports conflicting inferences must presume — even if not obvious from the record — that the factfinder resolved any such conflicts in favor of the verdict and must defer to that resolution. *Jackson*, 443 U.S. at 326.

In reviewing the factual sufficiency of the evidence, an appellate court must determine whether (1) the evidence introduced to support the verdict is "so weak" that the factfinder's verdict seems "clearly wrong and manifestly unjust," or (2) the factfinder's verdict is nevertheless against the great weight and preponderance of the evidence. *Watson v. State*, 204 S.W.3d 404, 414-415 (Tex. Crim. App. 2006). In a factual sufficiency review, the court views all of the evidence in a neutral light. *Johnson v. State*, 23 S.W.3d 1, 6-7 (Tex. Crim. App. 2000) (en banc). If the court finds the evidence factually insufficient, the court must remand the case for a new trial. *Clewis v. State*, 922 S.W.2d 126, 135 (Tex. Crim. App. 1996).

In order to declare that an evidentiary conflict justifies a new trial, an appellate court must rely on some objective basis in the record demonstrating that the great weight and preponderance of the evidence contradicts the jury's verdict. *See Lancon v. State*, 253 S.W.3d 699, 706-07 (Tex. Crim. App. 2008). An appellate court should not intrude upon the factfinder's role as the sole judge of the weight and credibility of witness testimony. *Vasquez v. State*, 67 S.W.3d 229, 236 (Tex. Crim. App. 2002). The factfinder may choose to believe or disbelieve any portion of the testimony presented at trial. *Bargas v. State*, 252 S.W.3d 876, 887 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (en banc)). Due deference must be given to the factfinder's determinations concerning the weight and credibility of the evidence and reversal of those determinations is appropriate only to prevent the occurrence of a manifest injustice. *Martinez v. State*, 129 S.W.3d 101, 106 (Tex. Crim. App. 2004).

A person commits the offense of sexual assault against a child if he intentionally or knowingly causes the penetration of the sexual organ of a child by any means. Tex. Penal Code Ann. § 22.011(a) (Vernon 2003). "Child" is defined as any person younger than 17 years of age who is not the spouse of the actor. *Id.* § 22.011(c)(1) (Vernon 2003). The offense becomes aggravated sexual assault against a child if the victim is younger than 14 years of age. *Id.* § 22.021(a)(2)(B) (Vernon 2003).

Proof of even the slightest penetration of the sexual organ is sufficient to find that a sexual assault has occurred so long as it is proved beyond a reasonable doubt; vaginal penetration is not required. *See Steadman v. State*, 280 S.W.3d 242, 248 (Tex. Crim. App. 2009); *Luna v. State*, 515 S.W.2d 271, 273 (Tex. Crim. App. 1974). The term "sexual organ," when referring to the female sexual organ, is a more general term that includes both the vagina and the vulva. *Everage v. State*, 848 S.W.2d 357, 358 (Tex. App.—Austin 1993, no pet.). More than mere contact with the outer vaginal lips is required, but reaching beneath a fold of skin into an area not usually exposed to view — even in nakedness — will constitute penetration. *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992) (en banc).

Physical or forensic evidence is not necessary to support a conviction, and is only a factor for the jury to consider in weighing the evidence. *Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). The uncorroborated testimony of a child victim is sufficient to support a conviction for sexual assault. Tex. Crim. Proc. Code Ann. § 38.07 (Vernon 2005); *Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Child victims of violent crimes cannot be expected to testify with the same clarity and ability as adult victims. *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990) (en banc); *Hemphill v. State*, 826 S.W.2d 730, 733 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd, untimely filed). Therefore, courts liberally construe the testimony given by child victims of sexual abuse. *See Lee*, 176 S.W.3d at 457.

In his first and second issues, appellant argues that the evidence is legally and factually insufficient to support a finding that appellant penetrated N.O.'s sexual organ. Specifically, appellant argues that (1) the only evidence presented was N.O.'s testimony, which appellant contends allowed for alternative interpretations and was not sufficient to demonstrate that penetration had occurred; (2) the State offered no medical evidence or physical evidence; and (3) the testimony by Spencer, the outcry witness, did not include testimony regarding touching or penetration of N.O.'s sexual organ.

At trial, N.O. testified as follows:

> THE STATE: Okay. Can you tell us what he would do that would make you feel uncomfortable?
>
> N.O.: (Pause.) He would — he would lay me down on the bed. I was trying to get away, and — he flipped me over. (Witness crying.) And held me down and got his hand and put it into my panties and he — squeezed my butt cheeks and he tried to go towards the front.
>
> * * *
>
> THE STATE: And where would he move his hand after he did that?
>
> N.O.: He went towards the front part, like not — like first, like — he went kind of towards the front but not all the way at first.
>
> THE STATE: Okay. And what was he doing with his hand when he would do that?
>
> N.O.: Like kind of wiggling 'em around.
>
> THE STATE: And what do you call the part that he was touching when he was doing that?
>
> N.O.: Like — it's not all the way in the front but it's kind of in the middle of the front and your butt so kind of — in between the legs but not all the way in the front part. I don't know the name of it. I'm not a scientist.
>
> THE STATE: Okay. Okay. But it's the part not all the way in the front where you use the restroom, but between there and where your bottom is; is that right?

N.O.: Uh-huh.

THE STATE: Okay. And when he would put his hand in there that's where his fingers would be?

N.O.: (Nods head.)

THE STATE: In the part between where you use the restroom and where your bottom is?

N.O.: (Nods head.)

THE STATE: Okay. And I see just for the record she's nodding her head up and down. When he would put his hand in there, would it — would it go in between your legs?

N.O.: No.

THE STATE: Not in between your legs?

N.O.: But like — okay, it would be in between my legs but it didn't go, like, inside.

THE STATE: Okay. So it didn't go in the hole, is that what you're saying?

N.O.: Yes.

THE STATE: Okay. Okay. But it would go in between there, is that what you're saying?

N.O.: Uh-huh.

* * *

THE STATE: And just so we can be specific enough, okay, you know the two pieces of skin that are down there where you use the restroom, right?

N.O.: (Nods head.)

THE STATE: Okay. Whenever his finger would be in your pants would it go in between those two pieces of skin but not in the hole?

N.O.: Huh — kind of sort of.

THE STATE: Okay. Can you explain what you mean by that.

N.O.: Like, the two pieces of skin that would be right there, are there, but like he wouldn't put 'em in the hole so they wouldn't — they weren't really in, they were kind of, in between.

THE STATE: It would be in between those two pieces of skin?

N.O.: Uh-huh.

THE STATE: Is that right?

N.O.: (Nods head.)

Appellant argues that the only evidence of penetration was a guttural response which the court reporter recorded as "Uh-huh" when N.O. was questioned regarding whether appellant's hand went between "those two pieces of skin that are down there where [she] use[s] the restroom." Appellant claims that N.O.'s responses of "Uh-huh" and a nod were not testimony, and that the issue of whether penetration had occurred was therefore left to the jury's interpretation of N.O.'s nods and non-verbal responses.

Nods and expressions such as "Uh-huh" are properly recorded by the court reporter. *Hill v. State*, 3 S.W.3d 249, 252 (Tex. App.—Waco 1999, pet. ref'd); *Uniform Format Manual for Texas Court Reporters*, 62 TEX. B.J. 583, 592 (1999).[2] If counsel or the court fails to refer to the witness's affirmative or negative gestures, then expressions such as "Uh-huh" and "Huh-uh" should be transcribed accordingly. *Hill*, 3 S.W.3d at 252; *Uniform Format Manual*, 62 TEX. B.J. at 583, 591-92. "Uh-huh" is used when a witness answers affirmatively, and "huh-uh" is used for negative answers. *Uniform Format Manual*, 62 TEX. B.J. at 592.

N.O. testified that appellant would "lay [her] down on the bed," after which appellant "flipped [her] over . . . held [her] down and got his hand and put it into [her]

[2] In an April 12, 1999 order, the Texas Court of Criminal Appeals adopted the Uniform Format Manual for Texas Court Reporters. The order became effective May 1, 1999. The Uniform Format Manual has also been adopted by the Supreme Court of Texas

panties . . . and he tried to go towards the front." N.O. further testified that the appellant "went kind of towards the front but not all the way at first," and that while his hand was there he was "kind of wiggling 'em around." When asked if appellant's fingers went "in between those two pieces of skin" that are "down there where [she] use[d] the restroom," N.O. responded "Uh-huh" and nodded her head affirmatively. This evidence establishes penetration of the vaginal lips, which is sufficient to support a conviction of aggravated sexual assault. *See Steadman*, 280 S.W.3d at 247-48; *Vernon*, 841 S.W.2d at 409.

Courts routinely have held that the jury is the sole judge of the facts, the credibility of the witnesses, and the weight to be given the evidence. *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000); *Beckham v. State*, 29 S.W.3d 148, 151 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The jury is in the best position to evaluate the credibility of witnesses and the evidence, and we must afford due deference to its determination. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006). Because physical or forensic evidence is not necessary to support a conviction, and the uncorroborated testimony of a child victim is sufficient to support a conviction, we defer to the finding of the jury. Tex. Crim. Proc. Code Ann. § 38.07; *Lee*, 176 S.W.3d at 458; *Jensen*, 66 S.W.3d at 534.

Viewing the evidence in the light most favorable to the verdict, the jury could have found beyond a reasonable doubt that appellant committed the offense of aggravated sexual assault. *See Jackson*, 443 U.S. at 326; *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006). Further, viewing all of the evidence in a neutral light, the jury could have found beyond a reasonable doubt that the appellant intentionally or knowingly penetrated the female sexual organ of N.O. *See Johnson*, 23 S.W.3d at 11. The evidence supporting the verdict is not so weak that the verdict is clearly wrong and manifestly unjust, nor is the verdict against the great weight and preponderance of the evidence. *See Watson*, 204 S.W.3d at 414-15. Thus, we find the evidence legally and factually

sufficient to sustain appellant's convictions for aggravated sexual assault of a child, and overrule appellant's first and second points of error.

II. Charge Error

In his third and fourth issues, appellant argues that the trial court erred by describing the terms "penetration" and "female sexual organ" in the jury charge.

A. Standards for Charge Error

We review a trial court's formulation of the jury charge under an abuse of discretion standard. *See Wesbrook v. State*, 29 S.W.3d 103, 122 (Tex. Crim. App. 2000) (en banc). When reviewing allegations of charge error, we must first determine whether error actually exists in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (en banc). If error is found, we must determine whether it caused sufficient harm to require reversal. *Id.* The degree of harm necessary for reversal depends on whether the appellant preserved the error by objection. *Id.* Jury charge error requires reversal when the appellant has properly objected to the charge and we find "some harm" to his rights. *Id.* (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc), *superseded on other grounds by Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988)). We determine whether there was "some harm" by examining the entire jury charge, the state of the evidence, the arguments of counsel, and other relevant information as found in the record as a whole. *Almanza*, 686 S.W.2d at 171; *Bargas*, 252 S.W.3d at 902.

A trial court has broad discretion in submitting explanatory phrases to the jury. *Macias v. State*, 959 S.W.2d 332, 336 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). A definition is proper if it helps the jury in answering the questions in the court's charge and is supported by the evidence and inferences drawn from the evidence. *Id.* As a general rule, terms need not be defined in the jury charge if they are not statutorily defined and jurors may understand them to have any meaning that is acceptable in common parlance. *Grotti v. State*, 273 S.W.3d 273, 281 (Tex. Crim. App. 2008). Terms that have

acquired a technical or legal meaning may require an explicit definition. *Id*. Defining terms is particularly necessary when there is a risk that jurors might arbitrarily apply their own personal definitions of the term or when the definition is necessary for a fair understanding of the evidence. *Middleton v. State*, 125 S.W.3d 450, 454 (Tex. Crim. App. 2003) (en banc).

The trial judge must not convey any personal opinion in the jury charge as to the truth or falsity of any evidence. *Russell v. State*, 749 S.W.2d 77, 78 (Tex. Crim. App. 1988) (en banc). A charge that assumes the truth of a controverted issue is an improper comment on the weight of the evidence. *Whaley v. State*, 717 S.W.2d 26, 32 (Tex. Crim. App. 1986) (en banc).

B. Penetration

The trial court stated as follows in the jury charge:

> Penetration occurs so long as contact with the female sexual organ could reasonably be regarded by ordinary English speakers as more intrusive than contact with the outer vaginal lips and is complete, however slight, if any.
>
> Touching beneath the fold of the external genitalia amounts to penetration within the meaning of the aggravated sexual assault statute.

Both paragraphs are taken verbatim from *Karnes v. State*, 873 S.W.2d 92, 96 (Tex. App.—Dallas 1994, no pet.). In turn, *Karnes* relied on *Vernon v. State*, 841 S.W.2d 407 (Tex. Crim. App. 1992) (en banc). *Vernon* held that in the context of the aggravated sexual assault statute, penetration means "pushing aside and reaching beneath a natural fold of skin into an area of the body not usually exposed to view," and "contact . . . [that] could reasonably be regarded by ordinary English speakers as more intrusive than contact with [the] outer vaginal lips." *See Vernon*, 841 S.W.2d at 409.

Appellant contends that these statements are an improper comment on the weight of the evidence. Appellant further argues that the absence of the phrase "if any" at the end of the second paragraph also constituted an improper comment on the weight of the evidence.

Appellant objected to the charge on these grounds in the trial court; therefore, we must first determine whether error exists in the charge, and then if error exists, whether the error resulted in "some harm" to appellant. *See Ngo*, 175 S.W.3d at 743; *Almanza*, 686 S.W.2d at 171.

The first paragraph states that "penetration . . . is complete, however slight." This language properly is included in the jury charge in sexual assault cases. *Wilson v. State*, 905 S.W.2d 46, 48-49 (Tex. App.—Corpus Christi 1995, no pet.); *Rawlings v. State*, 874 S.W.2d 740, 744-45 (Tex. App.—Fort Worth 1994, no pet.). The language used by the court told the jury that the penetration element of the State's case would be satisfied if the evidence showed penetration, however slight, beyond a reasonable doubt. *See Rawlings*, 874 S.W.2d at 744-745. This language did not inform or advise the jury that penetration had occurred in the case. *See Wilson*, 905 S.W.2d at 48-49. The absence of the phrase "if any" in the second paragraph does not suggest that penetration occurred. *See Wilson*, 905 S.W.2d at 49.

The remainder of the challenged language includes additional statements that are correct statements of the law. *See Vernon*, 841 S.W.2d at 409; *Karnes*, 873 S.W.2d at 96. Because the term "penetration" has a technical or legal meaning, the trial court acted within its discretion in describing the term for the jury. *See Vernon*, 841 S.W.2d at 409; *Grotti*, 273 S.W.3d at 281. The trial judge did not convey to the jury the judge's personal opinion as to the truth or falsity of the evidence regarding penetration, nor did the instruction assume the truth of a controverted issue. *See Russell*, 749 S.W.2d at 78; *Whaley*, 717 S.W.2d at 32. Therefore, the challenged portions of the jury charge did not constitute a comment on the weight of the evidence.

Even if it is assumed for argument's sake that the inclusion of the disputed language in the charge was erroneous, appellant cannot establish harmful error. When conducting a harm analysis, we consider the state of the evidence. *Almanza*, 686 S.W.2d at 171; *Bargas*, 252 S.W.3d at 902. In nodding and replying "Uh-huh" when asked if appellant's

fingers went "in between those two pieces of skin" that are "down there where [she] use[d] the restroom," and in describing how appellant's hand would be in her panties and while it was in there he was "wiggling 'em around," the complainant testified that the necessary penetration had occurred. The State did not emphasize the disputed language or discuss penetration during its closing argument. *See Almanza*, 686 S.W.2d at 171 (the arguments of counsel are a factor when determining harm). The contested statements permissibly informed the jury as to how the penetration element of the State's case would be satisfied if supported by the evidence. *See Rawlings*, 874 S.W.2d at 744. Under these circumstances, appellant cannot establish harm from the challenged portions of the jury charge. *See Brown v. State*, 122 S.W.3d 794, 797, 802-04 (Tex. Crim. App. 2003).

Accordingly, any asserted error in the charge is harmless, and the appellant's third point of error is overruled.

C. Female Sexual Organ

In his fourth issue on appeal, appellant argues that the trial court erred in defining the term "female sexual organ." Appellant contends that the definition given is overbroad, and that the trial court should have omitted from the definition those portions of the sexual organ that could not be penetrated. The jury charge stated as follows:

> "Female sexual organ" is defined as the entire female genitalia, including both vagina and the vulva. Vulva is defined as the external parts of the female genital organs, including the labia majora, the labia minora, mons veneris, clitoris, perineum, and the vestibule or entrance to the vagina.

The trial court's definition of "female sexual organ" was not erroneous. The term "female sexual organ" refers to "the entire female genitalia, including both the vagina and the vulva." *Karnes*, 873 S.W.2d at 96. The vagina is the genital canal in the female. *Everage*, 848 S.W.2d at 358. The "vulva" is defined as "the external parts of the female genital organs, including the labia majora, the labia minora, mons veneris, clitoris, perineum, and the vestibule or entrance of the vagina." *Breckenridge v. State*, 40 S.W.3d 118, 124 (Tex. App.—San Antonio 2000, pet. ref'd) (citing STEDMAN'S MEDICAL

DICTIONARY 1367 (3d ed. 1972)). To find appellant guilty of aggravated sexual assault, the jury was required to find that penetration occurred, meaning that contact was more intrusive than contact with the complainant's outer vaginal lips. *See Vernon*, 841 S.W.2d at 409. Thus, we cannot conclude that the trial court abused its discretion in defining the term "female sexual organ." Similar language has been found to be a proper jury instruction. *See Breckenridge*, 40 S.W.3d at 122.

Appellant further argues that even if this definition were proper, the court should have further defined the words "mons venerus, clitoris, and perineum" because they are not commonly used terms. Because penetration of those specific parts was not at issue, a more detailed definition of them was not required. *See Macias*, 959 S.W.2d at 336. We conclude that the trial court's definition of "female sexual organ" was proper. We overrule appellant's fourth issue.

Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
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