Affirmed and Opinion filed March 1, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00138-CR
NO. 14-10-00139-CR
NO. 14-10-00140-CR
NO. 14-10-00141-CR
NO. 14-10-00142-CR
NO. 14-10-00143-CR
NO. 14-10-00145-CR
NO. 14-10-00146-CR

JOE LOUIS BOGANY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause Nos. 1168760, 1205430, 1205429, 1205428,
1205427, 1205426, 1168761, 1205423

M E M O R A N D U M O P I N I O N

In a single trial, a jury convicted appellant of eight cases of possession of child pornography. The jury sentenced appellant to confinement for fifteen years in the

Institutional Division of the Texas Department of Criminal Justice in each case, to run concurrently. Appellant brings this appeal raising three issues. We affirm.

In his first issue appellant contends the trial court erred in overruling his motion to suppress. Appellant filed identical motions to suppress in each case alleging the search warrant was illegally obtained. Citing *Canady v. State,* 582 S.W.2d 467 (Tex. Crim. App. 1979), appellant asserts the motions should have been granted because the record does not reflect the search warrant or supporting affidavit was exhibited to the trial judge. In *Canady*, the Court of Criminal Appeals noted that "[w]hen a defendant objects to the court admitting evidence on the ground that it was unlawfully seized and the State relies on a search warrant, in the absence of a waiver, reversible error will result unless the record reflects that the warrant was exhibited to the trial judge." *Id.* at 469. *Canady* also provides that to bring a complaint on appeal regarding the search warrant and affidavit, the defendant must offer for the record on a bill of exception copies of the search warrant and of the affidavit. *Id.*

Appellant relies upon an excerpt from *Gant v. State*, 649 S.W.2d 30, 33 (Tex. Crim. App. 1983), to evade this requirement. *Gant* states ". . . there is no showing in the record before the Court that the purported Lampasas County arrest warrant was ever exhibited to the trial judge. Thus, the corollary rule - that if appellant desires an appellate review of the warrant and supporting affidavit, if any, he must offer a copy thereof for the record - never came into play in the case at bar." *Id.* In *Gant*, the admission of evidence was objected to on grounds it was tainted by a warrantless arrest and the State relied upon an arrest warrant. *Id*. The court held that under those circumstances, "in the absence of waiver, reviewable error will result unless the record reflects that the arrest warrant was exhibited to the trial judge for a ruling." *Id*.

Gant is distinguishable from the case at bar. When the motions to suppress were heard, the trial court stated, "I've read the affidavit and I'm denying your motion to suppress." Defense counsel then asked the Court "to consider the affidavit in light of the

issuance of the warrant. . .” Defense counsel argued the affidavit failed to describe “that any person saw child pornography on [appellant’s] computers before the issuance of a warrant.” The motions to suppress challenged the search incident to appellant’s arrest “when a warrant was obtained. . .” Officer Susan C. McAllister testified she executed a search warrant regarding appellant.

Appellant objected on the merits to the warrant and the affidavit and recognized the existence of a search warrant. It was therefore incumbent upon appellant to ensure they were included in the appellate record. *See Underwood v. State*, 967 S.W.2d 925, 927-28 (Tex. App. – Beaumont 1998, pet. ref’d). When the existence of the warrant is recognized in a motion to suppress and there is uncontradicted testimony that a warrant existed, it is not necessary for the record to show the warrant was exhibited to the court, unless there is an objection to its validity on its face. *Ortega v. State*, 464 S.W.2d 876, 878 (Tex. Crim. App. 1971). Because the affidavit and search warrant were never introduced into evidence or proven up by way of bill of exception, nothing is presented for our review. *See Rumsey v. State,* 675 S.W.2d 517, 519-20 (Tex. Crim. App. 1984); *Swain v. State,* 661 S.W.2d 125 (Tex. Crim. App. 1983); and *Dusek v. State,* 467 S.W.2d 270 (Tex. Crim. App. 1971). Appellant’s first issue is overruled.

In his second and third issues, appellant claims the evidence is legally and factually insufficient to support the jury’s verdicts. The Texas Court of Criminal Appeals recently determined that the *Jackson v. Virginia*[1] standard is the only standard a reviewing court should apply to determine whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010) (plurality op.). Accordingly, under current Texas law, in reviewing appellant’s issues we apply the *Jackson v. Virginia* standard and do not separately refer to legal or factual sufficiency.

[1] 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

We view all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 902. We do not sit as a thirteenth juror and may not substitute our judgment for that of the fact finder by re-evaluating the weight and credibility of the evidence. *Id.* at 901; *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 907. We defer to the jury's determinations of the witnesses' credibility and the weight to be given their testimony because the jury is the sole judge of those matters. *Id.* at 899. Our duty as a reviewing court is to ensure the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

Appellant first claims the evidence failed to establish the images in question actually constitute child pornography as defined by statute. *See* Tex. Pen. Code §§ 43.25(a)(2), (g), and 43.26(a) (West 2003 & Supp. 2009). Appellant was charged with possessing three categories of child pornography: (1) lewd exhibition of the female breast of a child younger than 18 years;[2] (2) lewd exhibition of the genitals of a child younger than 18 years;[3] and (3) visual depiction of a child under the age of 18 years engaging in deviate sexual intercourse, specifically oral sex.[4] We consider each category in turn.

[2] Appeal No. 14-10-00138-CR (trial court cause no. 1168760) (State's Exhibit 8); Appeal No. 14-10-00140-CR (trial court cause no. 1205429) (State's Exhibit 7); Appeal No. 14-10-00143-CR (trial court cause no. 1205426) (State's Exhibit 6); and Appeal No. 14-10-00146-CR (trial court cause no. 1205423) (State's Exhibit 2).

[3] Appeal No. 14-10-00139-CR (trial court cause no. 1205430) (State's Exhibit 4); and Appeal No. 14-10-00142-CR (trial court cause no. 1205427) (State's Exhibit 1).

[4] Appeal No. 14-10-00141-CR (trial court cause no. 1205428) (State's Exhibit 3); and Appeal No. 14-10-00145-CR (trial court cause no. 11687761) (State's Exhibit 5).

Lewd exhibition of the female breast of a child younger than 18 years

Appellant argues the photographs do not show a lewd exhibition of the child's breast.[5] In determining whether a visual depiction of a child's breast constitutes a lewd exhibition, we consider whether (1) the focal point of the visual depiction is the breast, (2) the place or pose of the child in the photograph is sexually suggestive, (3) the child is depicted in an unnatural pose or inappropriate attire, (4) the child is fully or partially clothed or nude, (5) the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, or (6) the visual depiction is intended or designed to elicit a sexual response in the viewer. *See Tovar v. State*, 165 S.W.3d 785, 791 (Tex. App. – San Antonio 2005, no pet.); and *Alexander v. State,* 906 S.W.2d 107, 110 (Tex.App.-Dallas 1995, no pet.).

State's Exhibit 2 depicts four girls, completely nude. Another girl's face, a girl's arm, and the lower half of two nude boys are also shown. State's Exhibit 6 shows a girl, completely nude, with her hands on the back of her hips, hair pulled back, with a pouting look on her face. State's Exhibit 7 shows a completely nude girl kneeling on the floor. State's Exhibit 8 depicts a girl standing completely nude, with her hands on top of her head, chest thrust forward.

In considering the factors noted above, the focal point of the visual depictions is the girls' breasts. The girls' poses are sexually suggestive. The girls are completely nude and are depicted in unnatural poses. Most of the visual depictions suggest sexual coyness or a willingness to engage in sexual activity. The images appear to be intended or designed to elicit a sexual response in the viewer. We therefore hold the evidence is legally sufficient for a rational trier of fact to find the photographs show lewd exhibitions of the female breast of a child.

[5] Appellant does not assert the children depicted are 18 years of age or older.

Lewd exhibition of the genitals of a child younger than 18 years

Appellant argues the photographs do not show a lewd exhibition of the child's genitals.[6] In determining whether a visual depiction of a child's genitals constitutes a lewd exhibition, we consider whether (1) the focal point of the visual depiction is the genitals, (2) the place or pose of the child in the photograph is sexually suggestive, (3) the child is depicted in an unnatural pose or inappropriate attire, (4) the child is fully or partially clothed or nude, (5) the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, or (6) the visual depiction is intended or designed to elicit a sexual response in the viewer. *See Tovar*, 165 S.W.3d at 791; and *Alexander v. State*, 906 S.W.2d at 110.

State's Exhibit 1 shows a young girl in a bathing suit. The lower part of the suit is a short skirt, with no bottom. The girl is leaning back on her hands, with her feet under her buttocks, so that her genitals are prominently displayed. In the top left-hand corner of the picture is a logo with the words "SEXY ANGELS." Appellant claims "[w]hile her legs are spread the genitals do not appear visible and are partly obscured by the water." The water is crystal clear and in no way obscures the child's genitals. In State's Exhibit 4, a young girl is standing completely nude. Her arms are crossed over her chest and her genitals are exposed.

In considering the factors noted above, the focal points in the photographs are the genitals of the girls. The poses are sexually suggestive. One of the girls is completely nude and the other is only partially clothed. Both girls are depicted in unnatural poses and one is in inappropriate attire. The visual depictions suggest sexual coyness or a willingness to engage in sexual activity and appear to be intended or designed to elicit a sexual response in the viewer. We therefore hold the evidence is legally sufficient for a rational trier of fact to find the photographs show lewd exhibitions of the genitals of a child.

[6] Appellant does not assert the children depicted are 18 years of age or older.

Visual depiction of a child under the age of 18 years engaging in deviate sexual intercourse

Appellant does not dispute that both photographs depict a girl engaging in deviate sexual intercourse, specifically oral sex.[7] Rather, appellant claims that no rational trier of fact could have found beyond a reasonable doubt the girls were under the age of eighteen. We disagree.

Section 43.25(g) of the Penal Code provides, in pertinent part:

> When it becomes necessary for the purposes of this section or Section 43.26 to determine whether a child who participated in sexual conduct was younger than 18 years of age, the court or jury may make this determination by any of the following methods:
>
> . . .
>
> (2) inspection of the photograph or motion picture that shows the child engaging in the sexual performance;
>
> (3) oral testimony by a witness to the sexual performance as to the age of the child based on the child's appearance at the time;
>
> . . .

Tex. Pen. Code § 43.25(g). The jury inspected the photographs. Our inspection of the photographs does not support appellant's claim that no rational trier of fact could have found the girls to be under 18 years of age. Moreover, Officer J.T. Roscoe testified State's Exhibit 5 is a depiction of a child performing oral sex on a male sexual organ and upon reviewing State's Exhibit 3, Sergeant Lynn Thomas White testified she saw "a girl that looks like she's under 18 performing oral sex." We therefore conclude the evidence is legally sufficient for a rational trier of fact to find the photographs are a visual depiction of a child under the age of 18 years engaging in deviate sexual intercourse.

For these reasons, we reject appellant's claim the evidence failed to establish the images in question constitute child pornography.

[7] State's Exhibit 3 is a photograph of a girl licking a man's erect penis. State's Exhibit 5 shows a girl with a man's erect penis in her mouth.

Appellant's second challenge regarding the sufficiency of the evidence is that the State failed to prove he knowingly possessed those items. Specifically, appellant asserts the State did not prove his connection with the images was more than fortuitous. Appellant points to the fact that he was not the exclusive occupant of the premises and other persons were allowed to use his computers.

The record reflects four computers were taken from appellant's home. One of the computers had a password-protected user folder for appellant. Multiple images were deliberately downloaded to the picture folder in appellant's user profile. Over 800 images of child pornography and over 2600 images of child erotica were found on the computer and the majority of those images were in the picture folder under appellant's password-protected profile. There were many "favorites" saved under appellant's user profile that linked to sexually explicit websites containing child pornography. There were images on appellant's computer from four different series that had been identified by the National Center for Missing and Exploited Children as being child pornography. The images found on appellant's computer were collected for over a year. There was testimony that finding actual child pornography is very difficult and to amass a collection the size found on appellant's computer would require daily access and a consistent effort.

Appellant had created different profiles on the computer for guests and his wife but testified that if he was already logged on in his user name, he would let others use his computer without logging on again. Appellant denied that all of the "favorites" linking to pornography sites were saved by him on his user profile. Appellant testified all of his computers had been infected with viruses. He also testified he had never seen the images that were shown in court. Appellant said he did not have an explanation for the images downloaded on his computer, "but it could have been a virus."

Lieutenant Matthew Gray, commander of the Internet Crimes Against Children Task Force for the Houston Region, testified he had never found a virus that actually downloaded child pornography to someone else's computer. In the last year alone, Gray

had conducted approximately 320 investigations and had never investigated a case where a virus was to blame. Gray testified a collection the size of the one on appellant's computer was large enough to be obvious to the owner of the computer.

Police also recovered videotapes of girls at the pool in front of appellant's apartment. Appellant's voice is heard on the tape but he denied being the one operating the camera. Appellant did not know who was operating the camera. The girls being videotaped were under the age of eighteen, many of them pre-pubescent. The video zoomed in on the front genital area, buttocks, and breasts. Additionally, there was a videotape of appellant posing a girl, aged ten to eleven. He pushed up her skirt and placed a teddy bear in her crotch.

Police also recovered a print-out of a chat log containing a sexually explicit conversation between "Lou Bog 2004," supposedly a sixteen-year old boy, and "Linda Melissa," purportedly a fourteen-year old girl. Appellant admitted his screen name was "Lou Bog 2004" but denied chatting with people under the age of eighteen and lying about his age. Appellant also testified he had never seen the print-out.

Chayene Bailey testified that in March 2008, when she was eleven, she went to appellant's apartment with a friend and appellant took pictures of her. He put his hands on the inside of her thighs and asked her to unbutton her pants. Appellant also tried to lift her shirt and touched her behind, under her clothing. Chayene testified appellant told her not to tell anyone what happened at the apartment because he would get in trouble. Appellant testified he did not do anything inappropriate to Chayene and denied telling her not to say anything.

Proof of a culpable mental state almost invariably depends upon circumstantial evidence. *Lee v. State,* 21 S.W.3d 532, 539 (Tex.App.-Tyler 2000, pet. ref'd). A jury can infer knowledge from all the circumstances, including the acts, conduct, and remarks of the accused and the surrounding circumstances. *Ortiz v. State,* 930 S.W.2d 849, 852 (Tex.App.-Tyler 1996, no pet.); *see also Dillon v. State,* 574 S.W.2d 92, 94

(Tex.Crim.App.1978). Although appellant denied having downloaded the images, it was for the jury to determine his credibility and the weight to be given his testimony. *See Brooks*, 323 S.W.3d at 899. From the circumstances, a rational trier of fact could find appellant knowingly possessed child pornography.

Accordingly, we find the evidence sufficient to support appellant's conviction and overrule issues two and three. The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Justices Anderson, Seymore, and McCally.
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