

Affirmed and Opinion filed November 20, 2014.



In The

Fourteenth Court of Appeals

NO. 14-13-00457-CR

VALDEMAR BAUTISTA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 506th Judicial District Court
Waller County, Texas
Trial Court Cause No. 11-05-13821**

O P I N I O N

This case involves a challenge to a conviction for the offense of “continuous sexual abuse of a child.” Appellant argues that the conviction is not supported by sufficient evidence and asserts several additional errors that he alleges prevented him from adequately challenging the complainant’s credibility. In particular, he alleges that the trial court erred in failing to grant a continuance after the complainant testified that she had received a medical exam and also asserts that the State wrongly suppressed evidence of the exam. He also challenges the trial

court's denial of a motion for a new trial based on newly-discovered evidence that the complainant recanted post-trial. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The complainant first made outcry when she was in the seventh grade by revealing incidents of sexual abuse to her school principal. The principal encountered the complainant's younger sister crying in the hallway at school and learned that the sister was afraid to go home. The complainant's sister disclosed that appellant Valdemar Bautista, her father, touched her and the complainant inappropriately. The sister stated that sometimes while she was asleep with the complainant, appellant would enter their room, get into their bed in between them, and touch them inappropriately. Upon hearing this information, the principal called the complainant out of class and queried her regarding her life at home. The complainant disclosed that appellant regularly came into the room she shared with her sister at night, laid down with them, and touched them inappropriately. During the interview, the girls were extremely distraught and held onto each other crying for a long time. As a result of the disclosures, the girls and their siblings were taken into custody by state authorities. The complainant was interviewed twice at the Child Advocacy Center. In her interviews, the complainant disclosed that appellant frequently required her to perform a variety of sexual acts. The complainant maintained her account throughout therapy and her interactions with the Texas Department of Family and Protective Services.

Appellant was charged by indictment with the felony offense of "continuous sexual abuse of a child," to which appellant pleaded "not guilty." At a bench trial, the State offered testimony from several witnesses including the complainant, a woman who interviewed the complainant at the Child Advocacy Center, and the complainant's school principal, therapist, and caseworker, among others. These

witnesses stated that both the complainant and the complainant's sister provided consistent, detailed descriptions of a variety of sexual acts in which they claimed the appellant forced them to engage. Appellant presented the testimony of the complainant's younger sister, who testified that she and the complainant fabricated the allegations because they were afraid of being disciplined.

The trial court found appellant guilty as charged and sentenced him to a term of forty years' confinement. Appellant filed a motion for new trial on the asserted grounds that favorable evidence was discovered after trial and that the State withheld evidence of medical exams. The trial court denied appellant's motion for new trial. Appellant now appeals his conviction, raising five appellate issues in which he challenges the legal sufficiency of the evidence and various trial court rulings.

II. ISSUES AND ANALYSIS

A. Sufficiency of the Evidence

In his first issue, appellant asserts that the evidence is insufficient to support his conviction. In evaluating a challenge to the sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The trier of fact "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 trier of fact may choose to believe or disbelieve any portion of the witnesses' testimony.

Sharp v. State, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

A person commits the offense of “continuous sexual abuse of a child,” as applicable to the case under review, if (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse; and (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age. Tex. Penal Code Ann. § 21.02(b) (West 2014).¹ An “act of sexual abuse” is an act that violates one or more specified penal laws, including section 21.11(a)(1), entitled “Indecency with a Child,” and section 22.021, entitled “Aggravated Sexual Assault.” A person commits the offense of “Indecency with a Child” if the person “engages in sexual contact with the child or causes the child to engage in sexual contact.” *See* Tex. Penal Code Ann. § 21.11(a)(1) (West 2014). A person commits the offense of “Aggravated Sexual Assault” if the person intentionally or knowingly causes the penetration of the sexual organ of a child under the age of fourteen by any means. *See* Tex. Penal Code Ann §§ 22.021 (a)(1)(B)(i), (ii), (iii), (iv), (v), (a)(2)(B) (West 2014). In this case, the indictment alleged that on more than one occasion appellant: 1) intentionally or knowingly engaged in sexual contact with the complainant by touching her genitals, 2) caused the complainant to touch

¹ We note that despite the use of the word “continuous” in the statute, only continual sexual abuse is required, *i.e.*, two or more acts of sexual abuse during a period that is 30 days or more in duration; the statute does not require nonstop, incessant, unbroken, or unceasing sexual abuse as use of the term “continuous” would suggest.

appellant's genitals, 3) penetrated the complainant's mouth with appellant's sexual organ, and 4) caused the penetration of the complainant's sexual organ with appellant's sexual organ. The indictment alleges that during these acts appellant was 17 years of age or older and the complainant was a child younger than 14 years of age.

At trial, the complainant's school principal and school vice-principal testified that they questioned the complainant and her sister separately regarding the appellant's actions. The two girls made similar disclosures. Both sisters continued to allege, throughout their interactions with caseworkers and therapists, that appellant forced them to perform sexual acts. The complainant testified at trial that appellant began touching her breasts when she was around eight or nine, but that the touching escalated when she was around eleven, twelve, or thirteen. At that point in time, appellant began forcing her to engage in intercourse with him.

The complainant explained that the first time appellant forced her to engage in intercourse she felt pain and found blood on her sheets, which she stated she threw away the next morning. The complainant testified that after that incident, appellant forced her to engage in intercourse frequently up until she disclosed the abuse. The complainant testified that in addition to forcing her to engage in intercourse appellant would tell her to "scratch him on the sides of his private stuff." When she would do this, appellant's penis was hard, smelled, and was "nasty." The complainant testified that she felt something wet and sticky. She could not identify the substance at the time, but she now knows that it was sperm.

The forensic interviewer from the Child Advocacy Center testified that in the first interview the complainant disclosed that appellant had touched the complainant inappropriately; later, the complainant disclosed that appellant forced her to engage in a variety of sexual acts. The interviewer stated that the

complainant was shy, timid, and nervous in the first interview and more confident in the second. At the end of the interview, the complainant asked the interviewer if the complainant would be able to have children after these events. The complainant's caseworker for the Texas Department of Family Services testified that she was present in family therapy sessions when the complainant and her sister disclosed the abuse to the rest of their family. The caseworker testified that initially the complainant was fearful and had to be prompted to speak in Spanish instead of English so that her mother could understand the disclosures. Both the complainant and her sister would make a disclosure and then cry.

The complainant admitted that she later told appellant's attorney that the allegations she had made were untrue. She explained that she recanted because her younger sisters were crying and asking for appellant. She stated that additionally, she was relying on a statement by appellant's attorney that appellant would not get close to her after getting out of jail. The complainant explained that the recantations were not true and that she eventually decided to tell the truth because that was the way to protect her sisters. The complainant's therapist testified that the complainant was pressured to recant by her older siblings and members of her family's church.

The State presented sufficient evidence to support appellant's conviction. *See* Tex. Code Crim. Proc. Ann. Art. 38.07 (West 2011); *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990) (concluding a child-complainant's testimony established element of penetration beyond a reasonable doubt). Appellant argues that the evidence is insufficient to support his conviction. He asserts that the evidence shows the complainant and her sister fabricated allegations to avoid corporal punishment for wearing pants to school, an act that is prohibited by appellant's religion. In support of this argument, appellant notes

that:

- There was no physical evidence of abuse.
- Appellant has no prior history of sexual abuse.
- Appellant worked long hours, usually seven days a week.
- No other witness claimed to have witnessed the inappropriate behavior.
- The first outcry came shortly after appellant observed the complainant's sister wearing pants to school.
- The complainant recanted her testimony and stated that she was not pressured to recant.
- The complainant had a reputation in the family for "telling untruths."
- The complainant's testimony was inconsistent with her sister's testimony with respect to whether appellant slept in their bed, her allegation that appellant abused her sister, and her statement that she informed her sister about the bloody sheets. The complainant's mother also testified she did not notice a missing sheet.
- The complainant testified that her mother was frequently out of the house at parties or in Oklahoma but the complainant's sister testified that their mother did not party and visited Oklahoma only once a year.
- The complainant's account was inconsistent with respect to whether her mother knew about the abuse and her testimony was inconsistent with her mother's testimony regarding the mother's knowledge.

Appellant's arguments that he worked long hours, has no prior history of sexual abuse, and that no other witnesses claimed to have witnessed the inappropriate behavior do not refute the complainant's testimony. Appellant's argument that there was no physical evidence of the abuse is insufficient to overturn his conviction. *See Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. [Panel Op.] 1978) (holding that victim's testimony is sufficient to prove sexual contact occurred even in absence of physical evidence); *Tinker v. State*, 148 S.W.3d 668, 669 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (same).

The rest of appellant's arguments amount to an attack on the complainant's

credibility. The trier of fact is the sole judge of the credibility of the witnesses. *Fuentes*, 991 S.W.2d at 271. We presume that the trial court, as trier of fact, credited the outcry statements and discredited the recantations. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (stating that recantation does not destroy probative value of outcry statement and that the factfinder is free to disbelieve recantation); *Chavez v. State*, 324 S.W.3d 785, 788 (Tex. App.—Eastland 2010, no pet.) (holding sufficient evidence supported conviction where victim made outcry statement and then recanted at trial).

We conclude that sufficient evidence supports appellant’s conviction. *See Villalon*, 791 S.W.2d at 134. Accordingly, appellant’s first issue is overruled.

B. Denial of Motion for New Trial Based Upon Newly-Discovered Evidence

In his second issue, appellant argues that the trial court abused its discretion in denying his motion for new trial based upon newly-discovered evidence. In particular, appellant states that the complainant issued a post-trial recantation. At the hearing on the motion for new trial, the complainant testified that her trial testimony was untrue. She stated that she lied during the trial because she was afraid that the prosecution would separate her from her family if she admitted that her allegations were fabricated.

A ruling on a motion for new trial will not be disturbed absent an abuse-of-discretion. *Keeter v. State*, 74 S.W.3d 31, 37 (Tex. Crim. App. 2002). Texas Code of Criminal Procedure Article 40.001, entitled “New Trial on Material Evidence,” provides that “[a] new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial.” Tex. Code Crim. Proc. Ann. art. 40.001 (West 2014). Newly-discovered evidence satisfies the “materiality” standard in the statute if:

(1) the newly discovered evidence was unknown or unavailable to the movant at the time of his trial; (2) the movant's failure to discover or obtain the evidence was not due to lack of diligence; (3) the new evidence is admissible and is not merely cumulative, corroborative, collateral, or impeaching; and, (4) the new evidence is probably true and will bring about a different result on another trial.

Keeter, 74 S.W.3d at 37. A new trial should be granted where a witness testifies to material exculpatory facts against an accused and recants after the verdict, but before a motion for new trial has been acted upon, only if the new evidence is "probably true." *Id.* It is within the trial court's discretion to discern the credibility of the witness and whether the new evidence is "probably true." *Id.* The trial court does not abuse its discretion in denying a motion for a new trial based on a recantation so long as the record provides some basis for disbelieving the testimony. *Id.* One basis for disbelieving a recantation is evidence that the recanting witness was subject to pressure by family members. *Id.*

The record reveals several reasons to disbelieve the complainant's post-trial recantation. The complainant had issued a pre-trial recantation, which was the subject of a substantial amount of trial testimony. At trial, the forensic interviewer testified that recantation is a stage of disclosure, and the Director of the Fort Bend Child Advocacy Center testified that sometimes children feel pressured to recant because the consequences of having disclosed abuse seem more difficult to endure than the abuse. She also testified that siblings can have a huge impact on a child-victim's response and that sometimes siblings are harsh to the victim in their attempt to keep the family together.

At trial, the complainant's sister, who previously had disclosed being abused by appellant, testified that she was afraid to go home on the day she first disclosed the abuse to her school principal, but after the principal described the role of Children's Protective Services, her "heart broke." The sister testified that she

thought she was going to a wonderful place, but that she ended up separated from her siblings and she never thought any of those consequences would occur as a result of her statements. The sister stated that she cried to the complainant and told her she wanted to go home because she missed her family. Two other siblings testified in support of their father and accused the complainant of lying. The complainant testified that she originally recanted in an effort to protect her younger sisters, who would cry and ask for their father, but the complainant then explained that she decided to testify truthfully at trial because she realized that telling the truth was the real way to protect them. The complainant's therapist testified that the complainant also had been pressured to recant by her older siblings and members of her father's church.

The record evidence would enable the trial court to conclude that the complainant was subject to pressure by family members, including her siblings. This evidence provided the trial court with a sound basis to determine that the post-trial recantation likewise was a result of pressure and that it was not "probably true." Accordingly, the trial court did not abuse its discretion by denying appellant's request for a new trial on the basis of the newly-discovered evidence of recantation. *See Keeter*, 74 S.W.3d at 37. We overrule appellant's second issue.

C. Denial of Motion for Continuance

In his third issue, appellant asserts that the trial court abused its discretion in denying his motion to continue trial based on the complainant's testimony that she underwent a forensic medical exam. Specifically, the complainant testified at trial that while she was in the custody of state authorities she went to a hospital and a woman ran tests on her. The complainant did not know the results of the tests.

We review a trial court's ruling on a motion for a continuance under an abuse-of-discretion standard. *See Duhamel v. State*, 717 S.W.2d 80, 83 (Tex.

Crim. App. 1986). Under the Texas Code of Criminal Procedure, the trial court is permitted to grant a continuance “when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be held.” Tex. Code of Criminal Proc. Ann. art. 29.13 (West 2014). When reviewing the trial court’s denial of a motion for continuance, we examine the circumstances presented to the trial court and determine whether the trial court abused its discretion in denying the motion. *Rodriguez v. State*, 21 S.W.3d 562, 565 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d).

Appellant asked to subpoena the records of “Texas Department of Family and Protective Services, CASA, medical physicians, psychiatrists, counselors, [and] therapists.” Appellant agreed with the trial court’s recommendation to remove the request that physicians disclose their records out of the fear that the Texas Department of Family and Protective Services would not comply with any portion of the request if it determined that providing medical records would violate the Health Insurance Portability and Accountability Act (HIPAA). In appellant’s motion for this discovery, though, he stated that physicians had information relevant to the complainant and her siblings. It is apparent from the face of this motion that appellant knew medical exams may have been performed.

The record also reveals that appellant’s counsel had access to the complainant and that she was cooperative with appellant’s counsel in the months leading up to trial. Appellant had ample time to ask the complainant if she had undergone any medical exams and to seek the trial court’s assistance in obtaining relevant results, but instead, appellant apparently waited until trial to ask the complainant that question. *See Williams v. State*, 768 S.W.2d 337, 341 (Tex. App.—Houston [14th Dist.] 1989, pet. ref’d) (holding that trial court did not err in

denying motion for continuance to examine bloody jacket because defendant could have examined jacket before trial); *Hernandez v. State*, 825 S.W.2d 765, 768 (Tex. App.—El Paso 1992, no pet.) (holding that reasonable diligence would have eliminated any surprise in trial testimony). The evidence in this record supports the trial court’s determination that appellant was not surprised by the testimony. The trial court did not abuse its discretion in denying appellant’s motion for a continuance after the start of trial on the basis that appellant was not surprised by the complainant’s testimony about the medical exams. *See* Tex. Code Criminal Proc. art. 29.13 (West 2014); *Williams*, 768 S.W.2d at 341. Accordingly, we overrule appellant’s third issue.

D. State’s Alleged Wrongful Withholding of Evidence

In appellant’s fourth issue, he asserts that he was denied due process of law because the State withheld evidence tending to establish his innocence. In particular, appellant alleges that the State possessed evidence of a medical exam that he speculated showed the complainant’s hymen had not been ruptured. Appellant argues that possessing and failing to disclose this evidence violates the requirements of *United States v. Bagley*, 473 U.S. 667, 669, 105 S.Ct. 3375, 3376 – 77 (1985) and *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963).

The State violates an accused’s right to due process of law if it suppresses favorable evidence that is material to either guilt or punishment. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. To establish reversible error under *Brady* and *Bagley*, a defendant must show that: (1) the State failed to disclose evidence, regardless of the prosecutor’s good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012); *Hampton v. State*,

86 S.W.3d 603, 612 (Tex. Crim. App. 2002). The State has a constitutional duty to disclose to a defendant material, exculpatory evidence in its possession. *Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011). This duty also requires the State to learn of *Brady* evidence known to others acting on the State's behalf in a particular case. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). But, *Brady* and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist. *Id.* at 407. The State does not have such a duty to disclose evidence if the defendant actually was aware of the evidence or could have accessed it from other sources. *Pena*, 353 S.W.3d at 810.

The District Attorney's Office in Waller County maintained an open-file policy. The prosecuting attorneys informed defense counsel of this policy during pre-trial status conferences and defense counsel did not advise the trial court that he had any difficulty accessing the State's files. At the motion for new trial, appellant presented an unsworn, unauthenticated document purporting to be a paragraph copied from an e-mail from an individual associated with the Texas Department of Family and Protective Services. The purported e-mail explains that the complainant and two of her sisters had forensic interviews and forensic medical interviews, but "it is suspected" that the complainant and her sisters never had "well-woman" appointments. The e-mail states, "[o]utcomes of appointments obtained by Waller County Sheriff's Department — Sharlonda Rutledge and fwd to Laurie Sellers."

At trial, Officer Sharlonda Rutledge testified that she was present for forensic interviews and requested medical exams. She also testified that she did not think medical exams were conducted, although she was not sure if they were done. She testified that she never received any medical records and that she did

not have any notice that medical exams were completed. She stated that to obtain medical records she either had to call the clinic or get the records via a grand jury subpoena, depending on the facility. Officer Rutledge testified that records were not subpoenaed, that she attended two sets of forensic interviews, wrote a report, and presented the report to the prosecutor.

Presuming for the sake of argument that the e-mail the e-mail presented by appellant in his motion for new trial was authenticated, it does not prove that the District Attorney's office had the results of any medical exam. First, the e-mail states that the children had "forensic medical interviews." It is unclear if a medical interview is an exam. Then, the e-mail states that it is suspected the children never had "well-woman appointments." Finally, the e-mail conveys merely that "outcomes of appointments" were obtained by the Waller County Sheriff's Department. The e-mail is ambiguous both with respect to whether a physical exam occurred and as to whether results from any medical exam were sent to the State. It is unclear what the State received, if anything, in terms of "outcomes." The e-mail is consistent with the State possessing the information that the State claimed to possess—results from forensic interviews with the children. The State maintained an open file policy and granted appellant access to its records. Appellant has not presented evidence that the State had access to additional medical records and withheld those records from him.

Even if appellant had established that the State had access to medical records, appellant has not proven that those records contained any information favorable to him. Appellant speculates that the records may have shown that the complainant's hymen was intact, but offers no proof that the records contained this information. Even if the records did contain this information, however, appellant bears the burden of showing that, in light of all the evidence, it is reasonably

probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure of this evidence. *See Hampton*, 86 S.W.3d at 612. The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish “materiality” in the constitutional sense. *Id.* Thus, appellant has not proven that the complainant could not have suffered sexual abuse and maintained an intact hymen. Appellant has not established that the evidence withheld was both favorable and material. *See id.*

After examining the trial record, we conclude appellant has not shown that he was denied due process of law because the State withheld material, exculpatory evidence. Therefore, we overrule appellant’s fourth issue.

E. Denial of Motion for New Trial Based on Alleged *Brady* and *Bagley* Violations.

In his fifth issue, appellant asserts that the trial court erred in denying his motion for new trial on the basis of the alleged *Brady* and *Bagley* violations. As discussed above, appellant has not shown the State withheld material, exculpatory evidence. Accordingly, the trial court did not abuse its discretion in denying appellant’s motion for new trial. *See Harm*, 183 S.W.3d at 409. We overrule appellant’s fifth issue.

III. CONCLUSION

Appellant's conviction is supported by sufficient evidence. The trial court did not abuse its discretion in denying appellant's motion for new trial based on the complainant's post-trial recantation where the record provided the trial court a basis for believing that the recantation was not "probably true" evidence. Nor did the trial court abuse its discretion in denying appellant's motion to continue where the evidence did not create a surprise. Finally, the trial court did not abuse its discretion in denying appellant's motion for new trial on the basis of his *Brady* and *Bagley* claims. Appellant did not prove that the State withheld exculpatory, material evidence.

The judgment of the trial court is affirmed.

/s/ **Kem Thompson Frost**
 Chief Justice

Panel consists of Chief Justice Frost and Justices Donovan and Brown.

Publish — TEX. R. APP. P. 47.2(b).