Affirmed and Memorandum Opinion filed February 23, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00372-CR

BO DANIEL SHAFER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1433928

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

A jury convicted appellant, Bo Daniel Shafer, of continuous sexual abuse of a child and sentenced him to confinement in the Institutional Division of the Texas Department of Criminal Justice for twenty–six years. From that conviction, appellant brings this appeal claiming the evidence is insufficient and he was denied a speedy trial. We conclude the evidence is sufficient to support appellant's conviction and that he was not denied a speedy trial. Accordingly, we affirm.

I. BACKGROUND

In May 2014, the complainant, Hermine,[1] made an outcry when she was in the fourth grade by revealing incidents of sexual abuse to her mother, Irene. At the time of the outcry, Hermine was ten years old. Hermine disclosed that her father, appellant, sexually assaulted her when she stayed with him.[2]

According to Hermine, the first incident happened when she was eight years old and appellant was staying at a coworker's house in Crosby, Texas. Hermine described several incidents of appellant sexually abusing her that occurred at the coworker's house and, thereafter, at appellant's apartment in Baytown, Texas. Hermine could not remember the last time she was abused, but believes she was nine or ten years old.

As a result of the disclosure, Hermine was taken to San Jacinto Methodist Hospital, where a cursory, nongenital examination was conducted and she was referred to Texas Children's Hospital. The next day, Hermine went to Texas Children's Hospital and underwent a physical examination. Thereafter, Bridgehaven Children's Advocacy Center conducted a forensic video-taped interview with Hermine. In her interview, Hermine disclosed that appellant regularly slept in the same bed or on a couch with her at night where he touched her inappropriately and frequently required her to perform a variety of sexual acts. Hermine maintained her account throughout various interviews and therapy.

Appellant was charged by indictment with the felony offense of "continuous sexual abuse of a child," to which appellant pleaded "not guilty." At a jury trial

[1] To protect the privacy of the complainant in this case, we identify her by a pseudonym, "Hermine." We identify Hermine's mother as "Irene."

[2] Hermine's parents were divorced. Since 2006, Hermine lived with Irene and visited appellant on alternating weekends and holidays.

conducted in March 2015, the State offered testimony from several witnesses including Hermine, an emergency room physician at San Jacinto Methodist Hospital, a registered nurse and sexual assault nurse examiner at Texas Children's Hospital, a forensic interviewer who questioned Hermine, a trauma focused cognitive behavior therapist/counselor, a reviewing psychologist, and Irene, Hermine's mother. The accounts of the witnesses who interviewed Hermine stated that she provided consistent, detailed descriptions of a variety of sexual acts in which she claimed the appellant forced her to engage. Appellant presented the testimony of his wife and Hermine's stepmother, Hermine's ten year old step brother, Hermine's pediatrician, a reviewing psychologist, appellant's cousin, and appellant's wife's aunt and appellant's employer, who either rebutted State's witnesses or testified as to appellant's character.

The jury found appellant guilty as charged and sentenced him to a term of twenty–six years' confinement. Appellant filed a motion for new trial, asserting new evidence and insufficient evidence. Appellant's motion for new trial was overruled by operation of law. Appellant now appeals his conviction, raising two appellate issues in which he challenges the sufficiency of the evidence and the denial of a speedy trial.

II. Sufficiency of the Evidence

In his first issue, appellant argues the evidence was legally insufficient to support his conviction of continuous sexual abuse of a child.[3]

[3] In his first issue, appellant challenges the factual and legal sufficiency of the evidence. As set forth, *infra*, the Texas Court of Criminal Appeals, however, has abolished factual-sufficiency review. *See Howard v. State*, 333 S.W.3d 137, 138 n.2 (Tex. Crim. App. 2011). Thus, we review appellant's sufficiency of the evidence challenge under only the legal sufficiency standard. *Lane v. State*, 357 S.W.3d 770, 773 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

A. Standard of Review

In evaluating a challenge to sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences from it, whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011); *see also Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). The jury is the exclusive judge of the credibility of the witnesses and the weight to be given to the evidence. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Further, we defer to the jury's responsibility to fairly resolve conflicts in testimony, weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id*. This standard applies to both circumstantial and direct evidence. *Id*. We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

The determination of what weight to give testimonial evidence rests within the sole province of the jury because it turns on an evaluation of credibility and demeanor. *Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The trier of fact may choose to believe or disbelieve any portion of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

B. Analysis

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 2011). An "act of sexual abuse" is an act that violates one or more specified penal laws, including section 22.021, entitled "Aggravated Sexual Assault." 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 2011). In this case, the indictment alleged that during a period of thirty or more days in duration appellant committed at least two acts of sexual abuse against a child, including an act constituting aggravated sexual assault of a child on or about March 2013 and an act constituting aggravated sexual abuse against a child on or around March 2014. 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.

The State presented direct evidence that Hermine, at age ten, made an outcry that appellant had sexually abused her since she was eight years old. The evidence in the record reflects that appellant penetrated Hermine's vagina with his tongue, finger, and penis. The record also reflects that appellant penetrated Hermine's anus with his penis. Hermine provided a detailed account of these sexual acts, including how they felt, where appellant's hands were and her positioning, appellant's genitalia, and things appellant did and said to her during and after the abuse. Her accounts of appellant's acts included testimony that no one explained to Hermine what the acts meant or what appellant meant by things he said. Hermine's testimony reflected that she was abused sexually by her father every weekend she visited him, and sometimes twice during those weekends, over an extended period of time that was thirty or more days in duration.

Moreover, the State presented evidence that Hermine had vaginal problems after visiting with appellant. Hermine's mother stated Hermine's panties had foul odors and discharge, and Hermine's genitals were swollen, red or inflamed. Hermine's pediatrician further testified that he had diagnosed Hermine on one occasion with a urinary tract infection and on another time with vaginitis, which according to Hermine's pediatrician was not common in little girls.

The State further presented testimony from Hermine's counselor at Bridgehaven that Hermine's account of the sexual abuse was consistent and that Hermine identified appellant as her abuser. Additionally, a staff psychologist at Bridgehaven testified regarding the amount of detail Hermine gave in her forensic interview, including Hermine "spontaneous[ly] acting out events, when she didn't have the skills to be able to talk about it or she was embarrassed...."

Appellant proffers reasons that the evidence is purportedly insufficient to support his conviction. He attacks the credibility of witnesses and whether Hermine's statements, behavior and testimony indicated any sexual assault had occurred. Appellant asserts he denied under oath ever sexually abusing Hermine and no witnesses testified he had a reputation for lying, while witnesses did testify that Hermine and her mother did. Several witnesses testified they trusted appellant with their own children as well as his children. Appellant further argues that no physical evidence showed that Hermine had been sexually assaulted. Finally, appellant contends that his ex-wife, Irene, had a strong motive to manufacture a story of an outcry by Hermine of sexual abuse and the power to persuade Hermine to tell that story.

Hermine's testimony alone is sufficient to support the conviction. *See* Tex. Code Crim. Proc. Ann. art. 38.07 (West Supp. 2016) (providing conviction for sexual assault of a child is "supportable on the uncorroborated testimony of the

victim...."); *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991) (recognizing outcry testimony alone can be legally sufficient evidence to support a conviction for sexual assault of a child); *see also 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); *Bargas v. State*, 252 S.W.3d 876, 888–89 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding child's testimony regarding abuse was alone sufficient to support defendant's conviction for aggravated sexual assault despite child's use of "unsophisticated terminology"); *Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (holding child's outcry statement was alone sufficient to support defendant's conviction for aggravated sexual assault). In addition, the State presented corroborating evidence as summarized above.

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 666, 669 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (same). Additionally, this fact does not render the evidence insufficient; testimony presented by the State also explained that it is common for a victim of sexual abuse to have normal physical findings because injuries heal quickly, both in the vagina and anus.

The rest of appellant's arguments are merely matters on which we defer to the jury in its role to judge the credibility of witnesses, weigh certain factors, and choose whether to believe some or all of a witness's testimony. *See Gear*, 340 S.W.3d at 746; *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (recognizing jury may choose to believe some, while rejecting other portions, of a

witness's testimony). The jury was free to resolve those issues in favor of believing the State's witnesses and determining that complainant's testimony, statements, and behavior supported a finding that appellant committed the offense. *See Gear*, 340 S.W.3d at 746; *Sharp*, 707 S.W.2d at 614.

We conclude the evidence is sufficient to support appellant's conviction for continuous sexual abuse of a child. Accordingly, appellant's first issue is overruled.

III. No Violation of Constitutional Rights

In his second issue, appellant argues that "Texas' denial of factual sufficiency review on appeal of criminal trials violates the Constitutional guarantees of equal protection and due process." Appellant asks this court to conduct a factual sufficiency review of the evidence adduced at trial using a standard that has been expressly overruled by the Texas Court of Criminal Appeals. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Additionally, appellant's argument has been expressly rejected by this Court. *Mayer v. State*, 494 S.W.3d 844, 848 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). In *Mayer*, we explained as follows:

> Prior to 2010, Texas courts maintained two different standards for evidentiary sufficiency review in criminal cases—the so-called "factual sufficiency" standard of *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996), and the "legal sufficiency" standard articulated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Finding that the two standards had become virtually indiscernible, the Texas Court of Criminal Appeals explicitly overruled *Clewis* and adopted the *Jackson* legal sufficiency standard as "the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks*, 323 S.W.3d at 912. Despite this clear pronouncement in *Brooks*, however, appellant asks us to

> effectively resurrect *Clewis* by applying its factual sufficiency standard to our review of his conviction. As an intermediate appellant court, we are without power to do so and are "bound to follow the law as declared by the state's highest courts." *LeBlanc v. State*, 138 S.W.3d 603, 606 (Tex. App.—Houston [14th Dist.] 2004, no pet.). When, in a situation such as this, the Court of Criminal Appeals "has deliberately and unequivocally interpreted the law in a criminal matter, we must adhere to its interpretation." *Mason v. State*, 416 S.W.3d 720, 728 n. 10 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Accordingly, we decline to consider appellant's contention that the high court's interpretation of the law runs afoul of the Due Process and Equal Protection Clauses of the United States Constitution. Appellant's third issue is overruled.

494 S.W.3d at 848.

For the reasons stated in *Mayer*, *supra*, we decline to perform a factual sufficiency review of the evidence. Consequently, appellant's second issue is overruled.

IV. No Violation of Right to Speedy Trial

In his third issue, appellant contends that he was deprived of his right to a speedy trial because his "trial was delayed nine months, from the filing of the complaint on July, 2014 through the start of trial in March, 2015."

The right of an accused to a speedy trial is guaranteed through the Sixth Amendment to the United States Constitution. *Zamorano v. State*, 84 S.W.3d 643, 647 (Tex. Crim. App. 2002). In addition, Article I, section 10 of the Texas Constitution guarantees the accused in all criminal prosecutions the right to a speedy and public trial. *Id*.

The United States Supreme Court set out four balancing factors to analyze a speedy trial claim: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Zamarano*, 84 S.W.3d at 648 (citing *Barker v. Wingo*, 407 U.S. 514, 530-34 (1972)); *see Henson*

v. State, 407 S.W.3d 764, 767 (Tex. Crim. App. 2013); *Smith v. State*, 436 S.W.3d 353, 363 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). "No single factor is necessary or sufficient to establish a violation of the right to a speedy trial; instead, the court must weigh the conduct of the prosecution and defendant using a balancing test of the four factors." *Id*., at 363–64 (citing *Barker*, 407 U.S. at 530, 533; *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008)).

A. Standard of Review

In assessing a trial court's ruling on a speedy-trial claim, we apply a bifurcated standard of review. *Cantu*, 253 S.W.3d at 282. We utilize a de novo standard of review for the legal components and an abuse of discretion standard for the factual components. *Id*.; *Zamarano*, 84 S.W.3d at 648. "Review of the individual *Barker* factors necessarily involves factual determinations and legal conclusions, but the balancing test as a whole is a purely legal question." *Cantu*, 253 S.W.3d at 282 (internal quotations omitted). With regard to the trial court's resolution of factual issues, we view all the evidence in the light most favorable to the trial court's ultimate ruling. *Id*. Because appellant lost in the trial court on his speedy–trial claim and the trial court did not enter findings of fact or conclusions of law on this issue, we presume that the trial court resolved any disputed fact issues in the State's favor and defer to the implied findings of fact supported by the record. *See id*.

B. Analysis

"To trigger a speedy trial analysis, an accused first must allege that the interval between accusation and trial has crossed the threshold dividing ordinary delay from 'presumptively prejudicial' delay." *Lopez v. State*, 478 S.W.3d 936, 942 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *see Celestine v. State*, 356 S.W.3d 502, 507 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Until there is

some delay which is presumptively prejudicial, there is no necessity for inquiry into the other *Barker* factors that go into the balance. *Id*. at 507 n. 3 (citing *Barker*, 407 U.S. at 530); *see also Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003).

Delay is measured from the time of formal accusation or arrest until the defendant is brought to trial or the demand for a speedy trial occurs. *See Celestine*, 356 S.W.3d at 507 (citing *U.S. v. Marion*, 404 U.S. 307, 313 (1971); *see also Ortega v. State*, 472 S.W.3d 779, 785–86 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Wells v. State*, 319 S.W.3d 82, 88 (Tex. App.—San Antonio 2010, pet. ref'd). There is no "bright–line rule for determining when a delay violated the right to a speedy trial." *Lopez*, 478 S.W.3d at 942. "'[T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.'" *Id*. (quoting *Barker,* 407 U.S. at 530–31). "The more serious and complex a crime is, the more tolerable a delay becomes." *Id.* Generally, a "delay approaching one year is sufficient to trigger a speedy trial inquiry." *Lopez*, 478 S.W.3d at 942 (citing *Shaw*, 117 S.W.3d at 889). Agreement to various resets, however, is inconsistent with invocation of a speedy trial right. *Id*. at 943; *Celestine*, 356 S.W.3d at 507.

In this case, appellant's trial was conducted in March 2015, which was approximately five months after the indictment in October 2014, and almost nine months since his formal accusation in July 2014. Appellant contends this delay is unreasonable. After the complaint was filed in July 2014, however, appellant's case was reset many times, each time by agreement (*i.e*., July 17, 2014; August 18, 2014; September 15, 2014; October 13, 2014). Moreover, appellant did not assert his right to a speedy trial until October 21, 2014. The parties agreed to additional

resets after the appellant requested a speedy trial (*i.e.*, October 22, 2014,[4] October 27, 2014; January 29, 2014; February 5, 2015; February 19, 2015). On February 13, 2015, appellant filed a motion to dismiss for failure to grant a speedy trial.

Prior to selecting a jury on March 3, 2015, defense counsel presented his motion to dismiss to the trial court, arguing that the case was originally set on the trial court's docket of January 29, 2015. The trial court observed that the case remained on the court's trial docket until all parties were available. The trial court denied appellant's motion to dismiss for failure to grant a speedy trial.

In analyzing delay in the speedy trial context, we exclude the time covered by agreed resets from the calculation "because agreed resets are 'inconsistent with [the] assertion of a speedy trial right.'" *Smith*, 436 S.W.3d at 365 (quoting *Celestine*, 356 S.W.3d at 507). Each reset form states, "[t]he undersigned Counsel hereby agrees this case is reset for [Type of Setting] on [Date] at [Time] a.m." The docket sheet notes that resets issued before the trial began on August 18, September 15, October 22, October 27 in 2014, and February 19, 2015, were "Reset Upon Defense Request" and remaining pre-trial resets were "Reset By Court" or "Reset By Operation of Law." Appellant's acts of seeking and agreeing to numerous resets were inconsistent with demand for a speedy trial. *See Lopez*, 478 S.W.3d at 943; *see also Henson*, 407 S.W.3d at 766 (noting defendant's actions were inconsistent with motion for speedy trial). Excluding that time from speedy trial computation, the short time-period not covered by agreed resets is insufficient to trigger a *Barker* analysis. *See Lopez*, 478 S.W.3d at 943 (two–month delay insufficient to trigger speedy trial analysis).[5] Appellant has failed to

[4] Appellant and the State signed a reset form on this date, noting that defense counsel was not present.

[5] Even if the time covered by agreed resets was included, the eight-month delay between complaint and trial would not trigger a *Barker* analysis in light of this case's seriousness and

demonstrate his right to speedy trial was denied.

We hold that appellant's trial was held within a reasonable amount of time and overrule appellant's third issue.

V. Conclusion

We affirm the judgment of the trial court.

/s/ John Donovan
Justice

Panel consists of Justices Busby, Donovan, and Brown.
Do Not Publish — TEX. R. APP. P. 47.2(b).

---

complexity. *See Sims v. State*, No. 08-01-00121-CR, 2002 WL 1482389, at *8 (Tex. App.—El Paso, July 11, 2002, pet. ref'd) (one year and twenty days was reasonable and insufficient to trigger *Barker* analysis in an aggravated sexual assault case).