



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00350-CR

Ruben **PESINA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 399th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR6053
Honorable Frank J. Castro, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: December 27, 2017

AFFIRMED

Ruben Pesina was convicted by a jury of indecency with a child by exposure. On appeal, Pesina contends the evidence is legally insufficient to support his conviction and the trial court erred in overruling his objection to a comment the prosecutor made during closing argument. We affirm the trial court's judgment.

BACKGROUND

The complainant G.O., a 14-year-old girl, testified she was walking to her house when a red truck or Suburban passed by and honked at her. G.O. stated she "flicked him off" and kept

walking. G.O. stopped when she saw the Suburban pull up a second time. G.O. stated the driver parked, rolled down his window, and showed her his penis. When asked how the driver “got his penis up so [G.O.] could see it through the window,” G.O. responded, “[h]e just went up like that and he just looked up and he went down like that and then he drove off.” The prosecutor asked that the “record reflect that the witness has made a gesture with her hand going up and down.”

G.O. called her mother because she was concerned the man would return. G.O.’s mother arrived in two minutes with G.O.’s stepfather, her aunt, and her two little brothers. G.O.’s stepfather decided to drive around and attempt to locate the vehicle. Within a minute, G.O. saw the vehicle. Her stepfather followed the vehicle and told the driver to pull over. Although the driver pulled into a location to stop, he then drove away. G.O.’s mother was able to get the vehicle’s license plate number, and she called the police. The police subsequently escorted G.O. and her mother to the police station. At the police station, G.O. was shown a lineup, and she quickly identified Pesina’s photograph. G.O. stated she was one hundred percent certain Pesina was the individual who exposed himself to her.

G.O.’s mother testified G.O. called her crying hysterically. G.O. told her mother a man stopped his truck and showed his penis to her. G.O.’s mother and stepfather drove to pick her up. G.O. was still crying and in shock, so G.O.’s mother put her in the car. G.O. described the man as having long hair, wearing a red shirt, and driving a red Suburban. They decided to go look for the vehicle. A few minutes later, G.O. pointed to a vehicle at a stop sign, and they turned around and proceeded to follow the vehicle. G.O.’s stepfather pulled alongside the vehicle and yelled at the driver to pull over. Although the driver initially pulled over, he never exited the vehicle but instead drove away. G.O.’s mother called the police and gave them a description of the vehicle and driver, the license plate number, and the location.

G.O.'s stepfather testified G.O. saw the vehicle within three minutes after they picked her up. He began following the vehicle and honked, but the driver ignored him. G.O.'s stepfather testified he then pulled next to the vehicle and yelled at the driver to get out of his vehicle. G.O.'s stepfather also yelled that the driver should not be showing his penis to a little girl. The driver followed G.O.'s stepfather and briefly pulled over but then drove away. G.O.'s stepfather attempted to continue to follow the driver, but he lost sight of the vehicle.

Detective Edward Sandoval interviewed G.O. and her mother and took their statements. Because of G.O.'s age, Detective Sandoval videotaped his interview with G.O. Using the license plate number provided by G.O.'s mother,¹ Detective Sandoval obtained a photograph of Pesina which was used in preparing a photo lineup.² G.O. identified Pesina's photograph in the lineup, and she stated she was one hundred percent certain of the identification.³ Detective Sandoval then obtained a warrant for Pesina's arrest. After Pesina was arrested and brought to the police station, Detective Sandoval interviewed him.⁴ During the interview, Pesina stated he was in the area when a car pulled alongside him, and the driver yelled at him to pull over. Pesina stated he thought he had cut the car off. Pesina denied exposing himself to a fourteen-year-old girl. On cross-examination, Detective Sandoval agreed G.O. might have identified Pesina from observing him in the vehicle after they followed him; however, Detective Sandoval also stated it is "pretty rare" for a witness to make a mistaken identification.

After hearing the evidence, the jury found Pesina guilty of indecency with a child by exposure. The jury assessed a three year sentence and recommended community supervision. The

¹ Detective Sandoval testified the vehicle having that license plate number matched the description of the vehicle provided by G.O.'s mother.

² The photographs used in the photo lineup were introduced into evidence.

³ The videotape of G.O. being shown the lineup and identifying Pesina's photograph was admitted into evidence and played for the jury.

⁴ A portion of the videotape of the interview was admitted into evidence and played for the jury. The video showed Pesina had shoulder-length hair and was wearing a red shirt.

trial court sentenced Pesina to three years' imprisonment but suspended the sentence and placed him on six years' community supervision.

SUFFICIENCY

As applicable in this case, the elements of indecency with a child by exposure are: (1) the defendant; (2) with a child less than seventeen years of age; (3) with intent to arouse or gratify the sexual desire of any person; (4) exposed his genitals; (5) knowing the child was present. TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (West Supp. 2017). In his first issue, Pesina contends the evidence is legally insufficient to establish his identity as the defendant or that he had the intent to arouse or gratify the sexual desire of any person.

When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether, based on the evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). The jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Id.*

A. Identity

Pesina contends the evidence is insufficient because G.O. only briefly observed the person who committed the offense but observed Pesina when G.O.'s stepfather tried to pull him over. Pesina also contends G.O.'s description of the perpetrator was vague. Finally, Pesina asserts it was extremely significant that G.O. was not asked to identify him in court.

Identity may be proven by direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Balderas v. State*, 517 S.W.3d 756, 766 (Tex. Crim. App. 2016); *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd). The absence of an in-court identification does not render the evidence insufficient on the issue of identity. *Adams v. State*, 418 S.W.3d 803, 810 (Tex. App.—Texarkana 2013, pet. ref'd); *Couchman v. State*, 3

S.W.3d 155, 162 (Tex. App.—Fort Worth 1999, pet. ref'd). In this case, G.O. identified Pesina from a photo lineup, indicating she was one hundred percent certain of the identification. Although Pesina points to factors the jury could have considered in assessing G.O.'s credibility, the jury chose to believe G.O., and her identification of Pesina as the defendant.

B. Intent to Arouse or Gratify the Sexual Desire of Any Person

In his brief, Pesina contends G.O.'s testimony regarding the exposure was vague. Pesina also argues the exposure may have been intended to repay G.O. for "flicking [the driver] off," rather than to arouse or gratify the driver's sexual desire.

"Rarely will there be direct evidence of what an accused intended at the time of the incident." *Scott v. State*, 202 S.W.3d 405, 408 (Tex. App.—Texarkana 2006, pet. ref'd). "Thus, the fact-finder usually must infer intent from circumstantial evidence rather than direct proof." *Id.* In the context of indecency with a child, intent may be inferred from a defendant's conduct, his remarks, and all of the surrounding circumstances. *Ranson v. State*, 707 S.W.2d 96, 97 (Tex. Crim. App. 1986); *Bazanes v. State*, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref'd). "An oral expression of intent is not required; the conduct itself is sufficient to infer intent." *Bazanes*, 310 S.W.3d at 40; *see also Scott*, 202 S.W.3d at 408 ("No oral expression of intent or visible evidence of sexual arousal is necessary.").

In this case, the evidence established Pesina first drove by and honked at G.O. He then returned, stopped his vehicle, rolled down his window, and moved his body so G.O. could see his penis through the window. From this conduct, the jury could infer Pesina intended to arouse or gratify his sexual desire.

CLOSING ARGUMENT

In his second issue, Pesina contends the trial court erred in overruling his objection to a comment the prosecutor made during closing argument.

During closing argument, defense counsel discussed G.O.'s testimony regarding the side of the street on which Pesina was driving as follows:

Folks, were you all confused about her testimony, because she was definitely confused, and it wasn't because I was trying to trick her or get her to do [sic] something that she didn't want to say. But remember her testimony was that he was driving in the same direction that I was walking, which would suggest to most reasonable people he's on the same side of the street. And I asked her, "Was he on the same side of the street as you?"

"Yes."

"He wasn't going on the wrong direction on that side of the street was he?"

"No, he wasn't."

What side of the vehicle did she tell you that she saw this happen? She says she saw it through the driver's side window that she says was down. Now, you go back there and you got to figure out what kind of magic makes it so that you can see from the sidewalk on one side over to the other side and through the driver's side window to see what's going on. The evidence is that she looked through the passenger side window.

The prosecutor responded to this discussion as follows:

So how can she sit there and — so defense counsel is making like it's a very complicated thing and it can't have happened that she couldn't have seen it through the passenger side. I don't know why it's so complicated. This is a sidewalk, right, folks? This is a street. I'm walking up against traffic. And what she is saying, she said there's cars coming in between. Right? That's exactly what she said.

So where is the driver's side going to be on a car going up the street like I'm going to go up the street? It's going to be facing her. It's ridiculous — it's a silly — I don't know why he's so confused about that. And I know he did confuse her about that, but it ain't confusing. She's walking up the street on this sidewalk. The street is over here. And so if you're driving up the street like she says he was driving up like her, he's going to be driving up here. That means his driver's side is facing her.

Because he's on the wrong side of the street he would be up on the same side of the street as her? That's a silly argument. Okay? But I know he did confuse her about it. But when you really look at what she said, it's not confusing. It's pretty easy. And he says he's not trying to trick her on purpose, but yeah, he is. Okay? And that's fine. Okay?

Defense counsel objected to the comment about him trying to trick G.O. as improper jury argument "striking at the defendant over the shoulders of counsel." The trial court overruled the objection.

"[P]roper jury argument generally falls within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing

counsel; and (4) plea for law enforcement.” *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). Arguments that strike at a defendant over the shoulders of defense counsel are improper. *Davis v. State*, 329 S.W.3d 798, 821 (Tex. Crim. App. 2010). “Although it is impossible to articulate a precise rule regarding these kinds of argument[s], it is fair to say that a prosecutor runs a risk of improperly striking at a defendant over the shoulder of counsel when the argument is made in terms of defense counsel personally and when the argument explicitly impugns defense counsel’s character.” *Brown*, 270 S.W.3d at 572 (quoting *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)); see also *Bailey v. State*, No. 01-15-00215-CR, 2016 WL 921747, at *14 (Tex. App.—Houston [1st Dist.] Mar. 10, 2016, no pet.) (not designated for publication) (accusing defense counsel of bullying a witness is an impermissible personal attack).

Accusing defense counsel of attempting to trick the complainant on purpose is improper argument. Improper argument, however, is non-constitutional error, and non-constitutional error “that does not affect substantial rights must be disregarded.” TEX. R. APP. P. 44.2(b); see also *Brown*, 270 S.W.3d at 572. “To determine whether [an] appellant’s substantial rights were affected, we balance the severity of the misconduct (*i.e.*, the prejudicial effect), any curative measures, and the certainty of conviction absent the misconduct.” *Id.* at 572-73. In evaluating the severity of the misconduct, we must examine the State’s entire closing argument “to determine if there was a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial.” *Id.* at 573 (internal quotation omitted).

Having reviewed the entire closing argument, we cannot conclude the State was making a willful and calculated effort to deprive Pesina of a fair and impartial trial. Furthermore, we do not believe Pesina was prejudiced by the prosecutor’s comment given G.O.’s description of Pesina to her mother, G.O.’s immediate identification of Pesina in the lineup, Pesina’s admission that he was driving in the area where the offense occurred, and Pesina’s appearance in his videotaped

interview. Accordingly, we hold the improper comment did not affect Pesina's substantial rights and must be disregarded.

CONCLUSION

The judgment of the trial court is affirmed.

Karen Angelini, Justice

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