Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00483-CR

Amber Don **CEARLEY**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CR1792
Honorable Dick Alcala, Judge Presiding[1]

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: July 17, 2019

AFFIRMED

Appellant Amber Cearley appeals her convictions for continuous sexual abuse of a child and indecency with a child by contact. In two issues, the appellant contends that she was erroneously found competent to stand trial and that the evidence is insufficient to support her convictions. We affirm.

[1] The Honorable Dick Alcala sitting by assignment. The Honorable Maria Teresa Herr heard appellant's motion for psychiatric examination, and the Honorable Andrew Carruthers, Criminal Law Magistrate, ordered a competency evaluation and presided over the competency disposition.

BACKGROUND

The State charged appellant in a four-count indictment with one count of continuous sexual abuse of a child and three counts of indecency with a child by contact. Appellant pleaded not guilty. At trial, following the presentation of the State's case, appellant moved for a directed verdict, which was denied. The charge of the court included two counts — one count of continuous abuse of a child and one count of indecency with a child by contact. The jury found appellant guilty of both counts, and following a sentencing hearing, recommended the sentences of twenty-five years for Count 1 and four years for Count 2. The trial court followed the jury's sentencing recommendation. This appeal followed.

COMPETENCY

Appellant contends she was erroneously found competent to stand trial despite clear evidence of her mental condition hindering her ability to aid in her defense.

Applicable Law and Standard of Review

Incompetency to stand trial is shown if a person does not have: "(1) sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against [her]." TEX. CODE CRIM. PROC. ANN. art. 46B.003(a). A trial court employs two steps in making competency determinations. "The first step is an informal inquiry; the second step is a formal competency trial." *Boyett v. State*, 545 S.W.3d 556, 563 (Tex. Crim. App. 2018). "An informal inquiry is called for upon a 'suggestion' from any credible source that the defendant may be incompetent." *Id.*; *see* TEX. CODE CRIM. PROC. ANN. art. 46B.004(a), (c), (c-1). During the informal inquiry, there must be "some evidence from any source that would support a finding that the defendant may be incompetent to stand trial." TEX. CODE CRIM. PROC. ANN. art. 46B.004(c). "If that requirement is met, the trial court must order a psychiatric or psychological competency examination, and, except for certain

exceptions, must hold a formal competency trial." *Boyett*, 545 S.W.3d at 563; *see* TEX. CODE CRIM. PROC. ANN. arts. 46B.005(a), (b), 46B.021(b). It is unnecessary to hold a trial on the issue of a defendant's competency if neither party requests a formal competency trial; neither party opposes a finding of incompetency; and the trial court does not determine that a formal competency trial is necessary to determine incompetence. TEX. CODE CRIM. PROC. ANN. art. 46B.005(c).

We review issues involving competency determinations for an abuse of discretion. *Montoya v. State*, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009), *superseded by statute*, TEX. CODE CRIM. PROC. ANN. art. 46B.004(c-1). We may not substitute our judgment for that of the trial court; instead, we determine whether the trial court's decision was arbitrary or unreasonable. *Montoya*, 291 S.W.3d at 426.

Discussion

Trial counsel's "Motion for Complete Psychiatric Exam" triggered an informal competency inquiry under subsection (c) of article 46B.004. TEX. CODE CRIM. PROC. ANN. art. 46B.005(c). The trial court ordered psychologist Dr. Raleigh Wood to conduct a competency evaluation of appellant. Dr. Wood filed a report in which he concluded appellant was competent to stand trial. In the report, Dr. Wood describes his evaluation of appellant and presents the following summary:

> [Appellant] presents as anxious and depressed and becomes easily tearful when discussing her current situation. There is no evidence from her interview to suggest the presence of a major mental illness such as a psychosis.
> …
> In regard to her competency status, she is able to demonstrate a basic knowledge of her charge, its seriousness and general courtroom procedure. She states she feels comfortable with her attorney and appears to have the capacity to assist with case preparation. She reports having some difficulty understanding information if it is not "broken down" in clear simple terms she can understand. … [I]t is the opinion of the undersigned that [appellant] is **competent to stand trial**.

(emphasis included in original). The trial court later convened a competency disposition hearing during which appellant's counsel stated he agreed with Dr. Wood's assessment that appellant was competent to stand trial.

Nothing in Dr. Wood's report suggests that appellant was incompetent to stand trial. Nothing in the record raises any ground to doubt appellant's competence to stand trial beyond the matters addressed by Dr. Wood. Further, appellant did not request a formal competency trial nor did the trial court determine that a formal competency trial was necessary. Considering the record as a whole, we cannot say the trial court abused its discretion by determining appellant competent to stand trial. Accordingly, issue one is overruled.

SUFFICIENCY OF THE EVIDENCE

Appellant contends neither the direct nor circumstantial evidence presented at trial supports her convictions for indecency with a child by contact and continuous sexual abuse of a child.

Standard of Review

In reviewing the legal sufficiency of the evidence, we determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) (emphasis omitted) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We view all the evidence in the light most favorable to the verdict, and we defer to the jury's responsibility to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences. *Id*. "To conduct a legal sufficiency review, we examine the statutory requirements necessary to uphold the conviction or finding." *Prichard v. State*, 533 S.W.3d 315, 319 (Tex. Crim. App. 2017).

Applicable Law

Continuous Sexual Abuse of a Child

"A person commits the offense of continuous sexual abuse if during a period that is thirty or more days in duration, the person commits two or more acts of sexual abuse … and 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)(1), (2). For purposes of this offense, an "act of sexual abuse" includes: touching, including touching through clothing, of the genitals of the child victim, if committed with the intent to arouse or gratify the sexual desire of any person; causing the sexual organ of the child to contact the mouth of another person, including the actor. *See generally id*. § 21.02(c)(2), (3) (incorporating section 21.11(a)(1), indecency with a child, and section 22.011, sexual assault, as the underlying predicate offenses).

Indecency with a Child by Contact

To obtain a conviction for indecency with a child by contact, the State must prove that the defendant engaged in sexual contact with a child under the age of seventeen. *Id*. § 21.11(a)(1). "Sexual contact" includes any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child provided said touching is done with an intent to arouse or gratify the sexual desire of any person. *Id*. § 21.11(c).

The Law of Parties

Under the law of parties, the State is able to enlarge a defendant's criminal responsibility to include acts in which he or she may not have been the principal actor. *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996). "A person is criminally responsible as a party to an offense if the offense is committed by [her] own conduct, by the conduct of another for which [s]he is criminally responsible, or by both." TEX. PENAL CODE ANN. § 7.01(a). "Each party to an offense may be charged with commission of the offense." *Id*. § 7.01(b). A person is criminally responsible

for another's conduct if, "acting with [the] intent to promote or assist the commission of the offense, [s]he solicits, encourages, directs, aids, or attempts to aid the other person [in] commit[ting] the offense or … having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, [s]he fails to make a reasonable effort to prevent commission of the offense." *Id.* § 7.02(a)(2), (3).

The Charge of the Court

The court's charge directed jurors that they would find appellant guilty of continuous sexual abuse of a child as charged in Count 1

> if you find from the evidence beyond a reasonable doubt that [appellant] did, either acting alone or together with Joseph Mendoza as a party, during a period … from on or about the 3rd Day of January, 2013 through the 3rd Day of June 2013 … commit two or more acts of sexual abuse against a child younger than fourteen (14) years of age … .

The charge then listed the alleged acts of sexual abuse, including two instances alleging appellant "intentionally or knowingly engage[d] in sexual contact with [Hailey[2]] … by touching part of [Hailey's] genitals with the intent to arouse or gratify the sexual desire of any person;" … one allegation that appellant "intentionally or knowingly cause[d] [Hailey's] sexual organ … to contact the mouth of [appellant];" and one allegation that appellant "intentionally or knowingly cause[d] [Hailey's] sexual organ … to contact the mouth of Joseph Mendoza." The court's charge for Count 1 also included an instruction regarding the lesser included offense of indecency with a child by contact.

The court's charge also directed jurors that they would find appellant guilty of indecency with a child as charged in Count 2

> if you find from the evidence beyond a reasonable doubt that on or about the 3rd Day of February, 2014 … [appellant] either acting alone or together with Joseph

[2] "Hailey" is the pseudonym adopted by the investigators in this case. We refer to the complainant by the same pseudonym.

> Mendoza as a party … intentionally or knowingly engage[d] in sexual contact with [Hailey] … by touching [Hailey's] breast … with the intent to arouse or gratify the sexual desire of any person.

Application

Evidence Presented at Trial

From January 2013 through May 2013, appellant and her children, including Hailey, lived with appellant's boyfriend Joseph Mendoza. Mendoza also "took [appellant] and her kids in" during February 2014. According to Hailey,[3] Mendoza touched her breasts and genital area, both over and under her clothes, "too many times to count." Hailey related that appellant gave her NyQuil, and she would "just go to sleep" but appellant told her about the things Mendoza did while Hailey was asleep. Hailey related that appellant told her Mendoza would make appellant watch while Mendoza touched Hailey "all over."

During the 2014 school year, Hailey told her school guidance counselor about the abuse. According to the guidance counselor, Hailey was nine at the time. After Hailey confided in her, the guidance counselor called Hailey's grandmother and contacted the authorities. Hailey's grandmother contacted Converse Police Department, which requested assistance with the investigation from the Texas Rangers. Texas Ranger Keith Pauska interviewed Hailey's grandmother and guidance counselor and attended Hailey's forensic interview, which was conducted at Child Safe. Ranger Pauska also interviewed appellant and Mendoza.

Ranger Pauska testified that appellant admitted "she gave [Hailey] NyQuil and Mendoza would digitally penetrate her or touch her vaginal area while they were having sexual intercourse." Appellant told Ranger Pauska "her hand was put there … and taken away[,] [o]r she took it away." The entirety of the DVD recording of appellant's interview with Ranger Pauska was admitted into

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[3] At the time of her testimony, Hailey was fourteen years old.

evidence and viewed by the jury during the Ranger's testimony. On the DVD, the jury heard appellant admit she gave Hailey NyQuil so she wouldn't wake up while Mendoza abused her. Appellant also stated that while she and Mendoza engaged in intercourse, Mendoza put his hand on Hailey's "privates" and rubbed. Additionally, the jury heard appellant explain that she did not report the abuse to police because she was told, and agreed, that if the child had no knowledge of the abuse, to bring it up would cause more problems in the long run.

The jury also heard testimony from Veneita Brown, who dated the brother of appellant's prior boyfriend, Harris. Brown testified that around May 2013, appellant contacted Harris to collect the children because "some things [had] happened to her daughter." According to Brown, appellant told her that Hailey had been molested, specifically that Mendoza "used his tongue to molest her; and that she gave [Hailey] NyQuil so she would sleep through it." Brown testified "[s]he just said that he used his tongue to vaginally penetrate her."

Mendoza testified that he pleaded no contest to a charge of aggravated sexual assault of a child with a sentencing cap of eighteen years in exchange for his testimony in the underlying case against appellant. However, when the State began questioning Mendoza, Mendoza stated he intended to "take back the plea" because anything he said "might incriminate [him], [his] chance at a fair trial." Nevertheless, Mendoza testified he witnessed appellant give Hailey NyQuil and admitted he told appellant Hailey was "frisky." When asked whether he remembered stating that appellant offered to let him "cop a feel on her daughter, Hailey" Mendoza answered "[s]omething to that effect, yes." However, when questioned whether he ever touched Hailey or witnessed appellant touch Hailey inappropriately, Mendoza answered in the negative. Finally, Mendoza testified appellant offered that "we could just home school them and — and live out in the country and they could be [my] girls forever."

Discussion

The evidence presented during trial shows appellant was not only aware of the abuse and did not contact authorities, but that appellant acted together with Mendoza to commit the offenses of indecency with a child and continuous sexual abuse of a child. Appellant admitted to Hailey that she observed what happened. Appellant admitted to Hailey she just gave up trying to prevent the abuse. Appellant further admitted during her interview with Ranger Pauska that she drugged Hailey to make her sleep while Mendoza abused her. Further, appellant offered to Mendoza that he could "cop a feel" of Hailey, and appellant admitted to Brown that Mendoza placed his mouth on Hailey's genitals and vaginally penetrated Hailey with his tongue after appellant gave Hailey NyQuil.

Viewing the evidence in the light most favorable to the verdict, we conclude that any rational trier of fact could have found beyond a reasonable doubt that appellant, acting together as a party with Mendoza, committed the offenses of continuous sexual abuse of a child and indecency with a child. Appellant's second issue is overruled.

CONCLUSION

Based on the foregoing reasons, we affirm the judgment of the trial court.

Irene Rios, Justice

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