In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-07-108 CR

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DUSTIN RYAN DUNLAP, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 260th District Court
Orange County, Texas
Trial Court No. D-060207-R

MEMORANDUM OPINION

A jury found Dustin Ryan Dunlap guilty of the offense of indecency with a child. *See* TEX. PEN. CODE ANN. § 21.11(a)(2) (Vernon 2003). The trial court assessed punishment at five years in prison, but suspended the imposition of sentence and placed Dunlap on community supervision for ten years.[1] Dunlap appeals his conviction.

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[1]The trial court also ordered that Dunlap serve 120 days in the county jail as a condition of probation.

In issue one, Dunlap argues the evidence is legally and factually insufficient to support the jury's verdict. The offense of indecency with a child by exposure has the following elements: (1) a person (2) knowing a child is present (3) who is younger than 17 and not the person's spouse (4) exposes the person's anus or any part of his or her genitals (5) with intent to arouse or gratify the sexual desire of any individual. *See* TEX. PEN. CODE ANN. § 21.11(a)(2); *Briceno v. State*, 580 S.W.2d 842, 843 (Tex. Crim. App. 1979); *Uribe v. State*, 7 S.W.3d 294, 297 (Tex. App.--Austin 1999, pet. ref'd).

In a legal sufficiency review, we consider all the evidence in the light most favorable to the verdict in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hampton v. State*, 165 S.W.3d 691, 693 (Tex. Crim. App. 2005). The trier of fact resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319. Unless otherwise provided by law, the trier of fact is the sole judge of the facts proved and of the weight to be given to the testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979), art. 36.13 (Vernon 2007); *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000); *see also Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008) ("Appellate courts should afford almost complete deference to a jury's decision when that decision is based upon an evaluation of credibility."). We resolve any inconsistencies

in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000) (citing *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988)).

In a factual sufficiency review, we consider all the evidence in a neutral light. *Roberts v. State*, 220 S.W.3d 521, 524 (Tex. Crim. App. 2007). We ask whether the evidence supporting the conviction, although legally sufficient, is so weak that the fact-finder's determination is clearly wrong and manifestly unjust or whether conflicting evidence so greatly outweighs the evidence supporting the conviction that the fact-finder's determination is manifestly unjust. *Neal v. State,* 256 S.W.3d 264, 275 (Tex. Crim. App. 2008).

Viewing the evidence in the light most favorable to the verdict, a rational fact-finder could find the essential elements of the crime beyond a reasonable doubt. It is uncontroverted that Dunlap was visiting in K.B.'s home on the night in question. K.B., a thirteen-year-old girl, testified Dunlap pulled his pants down when they were alone in the bedroom and began to masturbate in front of her. Article 38.07(a) of the Texas Code of Criminal Procedure provides that a conviction under Chapter 21, section 22.011, or section 22.021 of the Penal Code is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (Vernon 2005). It is undisputed that K.B. informed the school counselor within one year after the alleged offense date. In addition,

article 38.07 provides that the requirement that the victim inform another person of an alleged offense does not apply if at the time of the alleged offense the victim was a person seventeen (17) years or younger. TEX. CODE CRIM. PROC. ANN. art. 38.07(b) (Vernon 2005). K.B. was thirteen at the time of the offense.

From the evidence, it is clear Dunlap had the opportunity to commit the act. K.B.'s brother's testimony supports K.B.'s testimony that she and Dunlap were alone in another room of the house. This case turns on whether the jury believed K.B., who testified Dunlap exposed himself to her, or Dunlap, who testified he did not. The credibility of a witness is for the jury to decide. *See Lancon,* 253 S.W.3d at 705. "What weight to give contradictory testimonial evidence is within the sole province of the jury, because it turns on an evaluation of credibility and demeanor." *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997). The evidence supporting the verdict is not so weak that the jury's determination is clearly wrong and manifestly unjust, and the conflicting evidence does not so greatly outweigh the evidence supporting the conviction that the jury's verdict is manifestly unjust. The evidence is legally and factually sufficient to support the verdict. *See* TEX. PEN. CODE ANN. § 21.11(a)(2); TEX. CODE CRIM. PROC. ANN. art. 38.07 (a), (b). We overrule issue one.

In issue two, Dunlap argues his trial counsel was ineffective because he failed to file a motion in limine and failed to properly investigate and present an adequate defense. To obtain a reversal of a conviction on the ground of ineffective assistance of counsel, an

appellant must demonstrate both deficient performance and prejudice by showing that (1) trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cannon v. State*, 252 S.W.3d 342, 348-49 (Tex. Crim. App. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

Rather than filing a motion in limine, trial counsel objected to the admission of certain evidence during the trial. Dunlap references evidence that the visitation with his child was required to be supervised and that he was on leave from the Texas Youth Commission for acts of physical violence against a youth. Dunlap contends neither was true. Dunlap argues counsel should have filed a motion in limine that would have "prevented the jury from hearing this evidence and being tainted with its knowledge."

The mere failure to file pretrial motions, such as a motion in limine, does not categorically constitute ineffective assistance. *Autry v. State*, 27 S.W.3d 177, 182 (Tex. App.--San Antonio 2000, pet. ref'd). A trial court's grant or denial of a motion in limine is a preliminary ruling only and normally preserves nothing for appellate review. *Geuder v.*

State, 115 S.W.3d 11, 14-15 (Tex. Crim. App. 2003).

Appellant's point appears to be that if trial counsel had filed a motion in limine and the trial judge had granted it, the State would have had to ask the trial court's permission before the State could ask the question in the jury's presence; trial counsel could then have objected and received the ruling before the jury heard the evidence embedded in the question.

An appellant must object when the evidence is offered. *Roberts*, 220 S.W.3d at 533. Dunlap's trial counsel objected to the evidence during trial, and the trial court sustained his objections. The trial judge thereafter in the jury charge instructed the jury that "[i]n deliberating on the cause you are not to refer to or discuss any matter or issue not in evidence before you[.]" The objections to the evidence having been sustained, the jury could not consider the evidence. We presume the jury followed the trial court's instruction. *See generally Resendiz v. State*, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003) (citing *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998)). Nothing in the record suggests the jury disregarded the trial court's instructions.

Dunlap asserts other ineffective assistance claims. He alleges counsel failed to properly investigate and present an adequate defense. Specifically, Dunlap states trial counsel should have called independent witnesses such as K.B's older brother to recount the events of February 23, and a witness from Dunlap's employer to explain the employment suspensions and the "way things work at the juvenile units."

When challenging an attorney's failure to call a particular witness, an "applicant must show that [the witness was] available to testify and that his testimony would have been of some benefit to the defense." *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) (footnote omitted). Dunlap did not show the availability of K.B.'s older brother to testify at trial or any beneficial aspect of his testimony. Dunlap points to his own trial testimony that K.B.'s older brother came by the house during the evening and to the omission of that detail in K.B.'s testimony. The jury was free to decide whether to believe or disbelieve Dunlap's testimony that the older brother stopped by. Even if he had, this evidence does not contradict or impeach K.B.'s account of the details of the offense that occurred in the bedroom.

Dunlap described his employment at the Texas Youth Commission. He was a juvenile correction officer responsible for Class B offenders. Dunlap explained that any time a guard restrains a juvenile inmate who then claims injury, an internal investigation is conducted. Dunlap testified he was cleared of any wrongdoing in both investigations. No one contradicted Dunlap's testimony concerning the disposition of the investigations. Dunlap did not identify a specific witness from Dunlap's employment and did not establish a witness would have been available to testify at trial. Dunlap has not demonstrated on direct appeal his trial attorney's deficient performance, or prejudice from that performance. We overrule issue two. The conviction is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on September 24, 2008
Opinion Delivered October 29, 2008
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Before McKeithen, C.J., Gaultney and Horton, JJ.