

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00467-CR
NO. 09-15-00468-CR
NO. 09-15-00469-CR
NO. 09-15-00470-CR
NO. 09-15-00471-CR
NO. 09-15-00472-CR

RONALD EUGENE HICKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 14-08-09421-CR (Counts 1, 3, 4, 5, 7 and 8)

MEMORANDUM OPINION

Ronald Eugene Hicks appeals his convictions for aggravated sexual assault of a child (Count 1), indecency with a child by contact (Count 3),¹ indecency with a

¹ The judgment that is relevant to count three incorrectly states that the offense for which the defendant was convicted was “INDECENCY W/CHILD SEXUAL EXPOSURE” and identifies the applicable statute as section 21.11(a)(2)(B) of the Penal Code. However, the jury found Hicks guilty under count three of the

child by exposure (Count 4), aggravated sexual assault of a child (Count 5), indecency with a child by contact (Count 7),² and indecency with a child by exposure (Count 8).³ Hicks' indictment alleges that Hicks committed all six of the offenses that are the subject of his appeals on or about July 23, 2014, and the counts were all tried before the same jury even though three of the convictions are based on conduct involving "A.B.,"⁴ and three are based on conduct involving "D.B."

In two issues, Hicks challenges all six of his convictions. In issue one, Hicks argues his convictions should be reversed because during his trial, the trial court

indictment of arousing his sexual desire by engaging in sexual contact with a child younger than 17 years by having the child touch his genitals, an offense that is described by section 21.11(a)(1) of the Penal Code. Tex. Penal Code Ann. § 21.11(a)(1) (West 2011).

² The judgment relevant to count seven incorrectly recites that Hicks was convicted of "INDECENCY W/CHILD SEXUAL EXPOSURE" and identifies the applicable statute as section 21.11(a)(2)(B) of the Penal Code. However, the jury found Hicks guilty under count seven of the indictment of arousing his sexual desire by engaging in sexual contact with a child younger than 17 years by having the child touch his genitals, an offense that is described by article 21.11(a)(1) of the Penal Code. Tex. Penal Code Ann. § 21.11(a)(1) (West 2011).

³ The State abandoned counts two, six, and nine in the course of the trial, the counts were then dismissed, and they are not the subject of the complaints that Hicks raises in his appeals.

⁴ To protect the privacy of the two children identified in the indictment, we identify the children by using initials that do not reveal their names. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

abused its discretion by admitting evidence of child pornography discovered on his computer and cellphone. In issue two, Hicks argues the evidence presented to the jury is insufficient to support his convictions.

Insufficient Evidence

Standard of Review

For convenience, we address the arguments Hicks presents in his second issue first because resolving that issue in Hicks' favor would be dispositive of his appeal. *Burks v. United States*, 437 U.S. 1, 18 (1978) (explaining that the remedy for evidentiary insufficiency is to render a judgment of acquittal). In issue two, Hicks argues the jury could not rationally find him guilty based upon the testimony of the two children who testified in his trial, the evidence showing that upon the search of his residence, police discovered various sexual devices in his home, and evidence that police recovered pornographic images of children on Hicks' tablet computer and on his cellphone.

We review whether sufficient evidence supports a conviction under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under that standard, we view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational factfinder could have found the essential elements of the offense beyond a

reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (citing *Jackson*, 443 U.S. at 318-19). In a case tried to a jury, “[t]he jury is the sole judge of credibility and weight to be attached to the testimony of witnesses.” *Id.* Acting as the factfinder in a case, the jury may choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). Further, the jury is permitted to draw multiple reasonable inferences from the evidence that is admitted so as long as the jury’s inferences from the evidence are reasonable. *Temple*, 390 S.W.3d at 360. When the record supports conflicting inferences, we presume the jury resolved the conflict in favor of the verdict, and, we defer to its determination when the decision it made was based on conflicts in the testimony. *Id.*

In reviewing whether sufficient evidence supports a verdict, we consider all of the evidence in the record regardless of whether it should have been admitted. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Direct and circumstantial evidence are each probative of an actor’s guilt, and “circumstantial evidence alone can be sufficient to establish guilt.” *Temple*, 390 S.W.3d at 359 (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). In a circumstantial evidence case, each fact that is before the jury need not point directly and independently to the guilt of the defendant so long as the combined and cumulative force of all the incriminating circumstances warrant the conclusion that

the defendant is guilty. *Id.* (quoting *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993)); *Hooper*, 214 S.W.3d at 13. “After giving proper deference to the factfinder’s role, we will uphold the verdict unless a rational factfinder must have had reasonable doubt as to any essential element.” *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009).

The Evidence

The testimony in the trial indicates that in the summer of 2014, A.B. and D.B. were living with their grandparents in a house next to the house where Hicks lived. The two houses are separated by a locked fence. Hicks moved to the house where he was living in February 2014, and he rented the residence from A.B.’s and D.B.’s grandparents. Before they moved in with their grandparents, A.B. and D.B. had been living in a foster home. After moving, A.B. and D.B. continued to see “Nancy,”⁵ their former foster mother, about once a month.

According to Nancy, who testified in Hicks’ trial, A.B. told her something about Hicks in the summer of 2014 that prompted her to call the police. When Nancy contacted the police, A.B. was six years old and D.B. was five. The testimony in the

⁵ To protect the privacy of the two children involved in Hicks’ case, we also use pseudonyms for the names of all of the adults with whom the children lived during the periods that are relevant to the suit. *See* Tex. Const. art. I, § 30.

trial reflects that Nancy's report prompted the police to investigate whether Hicks caused the children to engage in any prohibited sexual conduct.

When Hicks' case was tried, A.B. was eight years old, and D.B. was six. Both of the children testified in the course of Hicks' trial. In her testimony, A.B. described an incident in which Hicks penetrated her sexual organ⁶ with his finger. A.B. also explained that after Hicks touched her sexual organ, he caused her to contact his sexual organ with her hand. Additionally, A.B. described a separate incident in which she saw Hicks without pants, and she testified that on that occasion, she saw his genitals.

When D.B. testified, she described an incident in which Hicks caused her to contact his sexual organ with her finger. D.B. also testified that she saw Hicks sitting on a couch without pants or underwear. According to D.B., Hicks showed her a movie of naked teen-aged girls who were kissing when she was at Hicks' home. At one point, D.B. stated that Hicks never touched her sexual organ with his hand. D.B. also testified in the trial that Hicks touched her sexual organ with a "buzzer." According to D.B., the incidents involving Hicks occurred during the summer, and the context of her testimony indicates that she was talking about the summer of 2014.

⁶ A.B. used a term not often used to label her sexual organ, so the prosecutor asked A.B. to identify the body parts she described in her testimony on a chart in which she identified the terms she used in her testimony.

D.B. explained that when she was at Hicks' home with A.B., he took photographs while she and A.B. were naked. D.B. stated that she had seen a camera and a sexual device in a white box under Hicks' bed, and she testified that she recognized a photo depicting a white box found by police beneath Hicks' bed.⁷ Generally, D.B. failed to provide the same degree of detail about Hicks' conduct toward her as compared to the degree of detail that A.B. provided the jury about what she claimed Hicks had done to her.

On September 4, 2014, A.B. and D.B. were examined by a sexual assault nurse, Jamie Ferrell. Nurse Ferrell testified during Hicks' trial that she is the clinical director for forensic nursing services for the Memorial Hermann Hospital System. According to Nurse Ferrell, when she examined A.B, A.B. told her that her neighbor "Mr. Ron" put his finger in her sexual organ and that she and D.B. touched his sexual organ. Nurse Ferrell also explained that A.B. could not identify the exact day when the sexual acts involving Hicks occurred. According to Nurse Ferrell, after examining A.B., she spoke to A.B.'s grandmother. A.B.'s grandmother told her that the children were last around Hicks at the end of July.

Nurse Ferrell also examined D.B. Nurse Ferrell's testimony includes a description of what D.B. told her. The conduct that Nurse Ferrell described in the

⁷ The evidence does not show that police recovered a camera from Hicks' home when they searched his home.

trial allowed the jury to reasonably conclude that Hicks inserted his finger into D.B.'s sexual organ and that Hicks caused D.B. to contact his sexual organ with her hand in a manner that is consistent with the conduct described in the counts on which Hicks was convicted. In her testimony, Nurse Ferrell indicated that she had been unable to collect DNA evidence from A.B. and D.B. because she saw them too many days after the assaults occurred. Additionally, Nurse Ferrell reported that based on her examinations, A.B. and D.B. had no apparent injury to their sexual organs.

Detective Melanie Bivins of the Montgomery County Sheriff's Office testified at the request of the State. According to Detective Bivins, she observed A.B.'s and D.B.'s forensic interviews, which were conducted in late August 2014. Detective Bivins testified that based on the information the children provided in their forensic interviews, she obtained a search warrant for Hicks' residence. Detective Bivins participated in the search of Hicks' home, and she seized sexual devices and sixteen videos containing pornographic images during the search. Detective Bivins explained that in the investigation, the police also seized several electronic devices that Hicks owned or used, including two laptop computers, a cellphone, a tablet computer, and four thumb drives. An analysis of the tablet computer that Hicks used revealed the tablet had pornographic images on it. Additionally, Detective Bivins stated that she recovered one of D.B.'s diapers behind a garbage can in the kitchen

of Hicks' residence, an empty strawberry soda bottle in the trash, and one of D.B.'s socks, which was discovered behind a drawer in Hicks' residence.

The evidence in the trial shows that the electronic devices recovered by the police in Hicks' case were inspected to determine whether they contained pornographic images. Jerry Serratt, an investigator with the Montgomery County Precinct One Constable's Office, examined the tablet computer that the police recovered in their investigation of Hicks' case. Serratt characterized eight of the images found on Hicks' tablet computer as "child pornography." Serratt also testified that he checked the pornographic images on the tablet with a database maintained by the National Center for Missing and Exploited Children. Six of the eight images of children on the tablet were in the Center's database. A crime scene investigator employed by the Montgomery County Sheriff's Office, Timothy Slusher, examined the laptop Hicks used in his work. Slusher indicated that the laptop had been used to access the internet and to search the internet for pornographic images of children. According to Slusher, the laptop's browser history indicated that the laptop had been used to search the internet for images of child pornography in August 2014, and that the searches were done by someone using the profile "Ron." Slusher explained that he thought some of the images on the laptop were possibly those of children, depending on the actual age of the persons in the images, and that the images in his opinion were pornographic. Slusher also testified

that he was the person who examined several thumb drives found in the search of Hicks' residence. According to Slusher, the thumb drives contain pornographic images, but the images on the thumb drives did not depict images of children.

During the guilt-innocence phase of Hicks' trial, the jury heard testimony about another alleged incident involving the sexual assault of a fifteen-year-old child that occurred more than ten years before the conduct that was at issue in the trial. "Samantha"⁸ was twenty-seven when Hicks was tried for the offenses involving A.B. and D.B. According to Samantha, Hicks and his girlfriend had assaulted her in the city where Hicks was living when she was fifteen. Samantha explained she informed one of her teachers of the incident, and her teacher reported the incident to the police. Samantha stated that she could not recall whether Hicks had been charged at that time.

A detective involved in the investigation of Samantha's case testified in Hicks' trial. The detective testified that Hicks admitted to him during his investigation of Samantha's case that Samantha had been in his home. According to the detective, Hicks also claimed that he had not had any sexual contact with

⁸ To protect the privacy of this witness, we identify this witness by using a pseudonym. *See* Tex. Const. art. I, § 30.

Samantha. The detective testified that Hicks was convicted of misdemeanor assault based on the allegations in Samantha's case.

When Hicks presented his defense, he called Samantha's father to prove that Samantha had a motive to lie when she claimed that Hicks sexually assaulted her. Samantha's father testified that Hicks had been his business partner and that Hicks had accused him of diverting money from the business. Nonetheless, Samantha's father denied that he ever attempted to have Samantha falsely accuse Hicks of a crime in retaliation for Hicks accusing him of diverting money from the partnership.

Hicks also called "Jill,"⁹ his girlfriend in the summer of 2014, in presenting his defense. Jill testified that many of the sexual devices found by the police in Hicks' home belonged to her. Jill also testified that she was the person who threw the diaper in the trash that the police found when they searched Hicks' house, and that the diaper had been used by her son. According to Jill, she never saw A.B. or D.B. in Hicks' home.

Hicks was the last witness who testified in his defense. According to Hicks, he never used any sexual devices before meeting Jill, and he stated that they only used them on each other. Hicks testified that A.B. and D.B. came to his home only three or four times. He explained that when he first met A.B. and D.B., they were

⁹ Given the subject matter of the case, we also identify this witness by using a pseudonym.

with their grandmother. Hicks recalled that on one occasion in July 2014, the two girls were with their grandmother when she asked him to make a six month advance payment of his rent. Hicks also indicated that the two children came into his yard on the weekend of July 28, 2014. Hicks recalled that he was working in the yard when A.B. and D.B. came into his yard and ran through the water as he was watering his plants. Hicks testified that after he finished watering, he mowed his grass, and then went inside, showered, and changed clothes. According to Hicks, while sitting on the steps drinking a soda, A.B. and D.B. approached him and asked whether they could have sodas too. After he gave the children sodas, D.B. asked if she could use the bathroom. Although D.B. went into the house alone, Hicks later sent A.B. in the house after her because it was taking D.B. too long to use the bathroom. According to Hicks, approximately five minutes after he sent A.B. into his home, he became concerned and walked into the house. Hicks testified that he saw D.B. digging through change in an ashtray and a candy jar, and that he saw A.B. opening his wallet. Hicks testified that he threatened to tell their grandmother, but before running off, A.B. replied: "I know things to tell on you that you will be in big trouble for." According to Hicks, after the children left his house, he did not see them again.

Hicks' testimony, had the jury believed it, might have resulted in his acquittal. For instance, Hicks suggested in the trial that others could have accessed the computers he used for his work. He suggested that Samantha had framed him

regarding the alleged sexual assault. In the course of his testimony, Hicks denied engaging in any sexual acts involving A.B. or D.B., and he denied that he ever looked at any of the pornographic images of children found by the police on his computers. Hicks claimed that it was merely a coincidence that images on the electronic devices included pornographic images depicting children.

On appeal, Hicks argues that the evidence that he is guilty is too weak to support a conclusion that he is guilty beyond reasonable doubt. According to Hicks, A.B. and D.B. had very limited opportunities to encounter him given the hours that he worked and the limited access the children had to his yard. Hicks points out that none of the adult witnesses in his trial, including the members of A.B.'s and D.B.'s family, testified that they saw A.B. or D.B. inside his home. Hicks suggests the two children falsely accused him of crimes because he caught them stealing. Hicks also points out that although the minors claimed that he took their photographs, the investigation in his case failed to produce any evidence that he owned a camera or that he had their images on his computers. Hicks also argues that the fact the children were not found to have any injuries is additional circumstantial evidence showing that he is innocent. While Hicks notes that the two children described the various sexual acts that led to his convictions, their testimony conflicts with his testimony about events that he testified never occurred.

We are not persuaded that the evidence is insufficient to support Hicks' convictions. By statute, a conviction for indecency with a child or aggravated sexual assault of a child may be supported by the uncorroborated testimony of the victim if the victim is seventeen or younger. *See* Tex. Code Crim. Proc. Ann. art. 38.07(b)(1) (West Supp. 2016). In this case, A.B. and D.B. told Nurse Ferrell about the various sexual acts that form the basis of Hicks' convictions. The examinations occurred approximately one month after the State alleged that the offenses occurred. While the two minors described Hicks' misconduct in more detail when they were examined by Nurse Ferrell than they described them in the trial, the jury was entitled to rely on both the accounts the children provided at trial and the accounts they gave to Nurse Ferrell in deciding whether to believe Hicks committed the various acts that are alleged in the counts of the indictment on which the jury found him guilty. While Hicks suggests that no adults placed him with the children inside the house, Hicks testified that he was alone with the children in his house on at least one occasion. Additionally, although Hicks claims the children falsely accused him of crimes, the jury, as the finder of fact, was free to reject Hicks' testimony that he saw the children stealing when he went into his home. *See Laster*, 275 S.W.3d at 524-25.

In addition to the testimony of the two children, there is other circumstantial evidence that lends support to the jury's verdict. Jill's testimony indicates that Hicks had several sexual devices in his home in July and August of 2014, and that

circumstance is consistent with the minors' testimony they saw sexual devices in Hicks' home. Additionally, the images and browser histories from the tablet and laptops Hicks used reveal that someone who had access to them had an interest in child pornography. Based on the testimony, the jury was free to infer that Hicks was the person who placed the pornographic images of children on the tablet computer assigned to him by his employer, and to infer that he was the person who had used the laptop to search the internet for pornographic images of children. Finally, the jury was also entitled to consider Samantha's testimony about the sexual assault Hicks committed against her in considering whether Hicks was the type of person who would engage in sexual acts with children.

Under Texas law, jurors are allowed to draw reasonable inferences from the evidence when the jurors' inferences are supported by the evidence that is admitted during trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016). Appellate courts are required to affirm a jury's verdict unless the verdict, in light of all of the evidence presented in the defendant's trial, would not allow a reasonable jury to have found the defendant guilty. *Id.* In Hicks' case, the gaps and inconsistencies in the accounts the children gave about what Hicks did to them are not so significant that they show that no rational jury would have rejected their testimony and chosen to accept Hicks' testimony instead. We conclude that the cumulative force of the direct and circumstantial evidence regarding Hicks' guilt allowed the jury to reasonably

conclude that Hicks committed the six offenses on which he was found guilty. We overrule issue two.

Evidence of Extraneous Offenses

In issue one, Hicks argues the trial court erred by admitting evidence of thirty-one images obtained from a tablet computer assigned to Hicks by his employer. According to Hicks, the fact that the tablet contains pornographic images is not relevant to proving that he committed the conduct that resulted in his convictions. Additionally, Hicks argues that the evidence was not admissible as character evidence under Rule 404. *Compare* Tex. R. Evid. 404(b)(1) (providing that evidence of crimes, wrongs, or other acts is not admissible to prove a person's character), *with* Tex. R. Evid. 404(b)(2) (providing a non-exhaustive list of nine exceptions to Rule 404(b)(1)).

During the trial, Hicks objected when the State offered the images found on the tablet computer on the basis they were not relevant because the images did not depict children. Additionally, in his trial, Hicks suggested that admitting the images would be unfairly prejudicial. The trial court overruled his objections.

On appeal, Hicks argues that the images were not admissible under any of the exceptions found in Rule 404(b) of the Texas Rules of Evidence. The State argues that the objection Hicks lodged to the images at trial amounted to a general relevance

objection, and as such, his objection was not sufficiently specific to preserve his argument that the images were inadmissible under Rule 404(b).

We agree with the State that Hicks made a general relevance objection to the images during his trial. A general objection based on relevance alone fails to alert the trial court to a complaint that the evidence is inadmissible based on Rule 404. *See Medina v. State*, 7 S.W.3d 633, 643 (Tex. Crim. App. 1999) (noting that a general objection to relevance does not preserve error concerning a Rule 404 extraneous offense claim); *see also* Tex. R. App. P. 33.1 (noting that to preserve error for appellate review, the complaining party must show that he presented his complaint to the trial court in a timely request, objection, or motion and that the trial court ruled on the request).

Even had Hicks directed the trial court to Rule 404 in objecting to the admission of the images, some of the images on the tablet appear to depict children, and the admissibility of pornographic images of children in trials involving a charge of aggravated sexual assault of a child is a matter that is governed by section 2 in article 38.37 of the Texas Code of Criminal Procedure. *See* Tex. Code. Crim. Proc. Ann. art. 38.37, § 2 (West Supp. 2016). In trials involving defendants charged with indecency with a child or aggravated sexual assault of a child, article 38.37 provides that, notwithstanding Rule 404 and 405 of the Texas Rules of Evidence, evidence showing that the defendant possessed child pornography may be admitted in the trial

“for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.” *Id.* § 2(a)(1)(C), (E), (H), § 2(b). Moreover, Hicks has not argued that the images depicting children in sexual situations were not relevant for the purpose of showing that he has an abnormal interest in child pornography.

Arguing that admitting the images was unfairly prejudicial, Hicks also argues that the trial court abused its discretion by failing to exclude the thirty-one images admitted in his trial. *See* Tex. R. Evid. 403. In response to the Rule 403 objection that Hicks lodged at trial, the trial court was required to engage in a balancing test by considering:

(1) the inherent probative force of the proffered item of evidence along with (2) the proponent’s need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006). “Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial.” *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006).

In his appeal, Hicks does not argue that developing the evidence about the images on his computers required an inordinate amount of time, and he appears to concede that only two witnesses, the two children who testified, provided first-hand accounts about his acts that resulted in his convictions. Given that the children were very young when the case was tried and that they were the primary source of the testimony describing what Hicks did to them, the State had a significant need for circumstantial evidence tending to show that Hicks has an abnormal sexual interest in children.

According to arguments that Hicks makes in his brief, the images are not unfairly prejudicial because of what is in them. Instead, Hicks suggests the images are unfairly prejudicial because A.B. and D.B. are not depicted in them. According to Hicks, admitting the images was unfairly prejudicial because admitting the images “only served to inform [the jurors] that he engaged in a stigmatized activity.”

In our opinion, the fact that Hicks possessed pornographic images of children was probative because it showed that Hicks has a sexual interest in children, an interest that arguably makes it more likely that Hicks would commit crimes like those the children described in the trial. Additionally, given the fact that the children did not have any visible injuries to their sexual organs when examined by Nurse Ferrell, the State had a substantial need for circumstantial evidence to show that Hicks was a person who might act on the sexual urges he had toward children. We

conclude the trial court did not abuse its discretion by finding that the probative value of the images outweighed any danger that they might be unfairly prejudicial. *See* Tex. R. Evid. 403. We overrule issue one.

Having overruled both of Hicks' issues, we affirm the trial court's judgments.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on May 23, 2017
Opinion Delivered September 20, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.