In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00061-CR

DUANE CHARLES PARKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 15-10-10858-CR

MEMORANDUM OPINION

A jury convicted appellant Duane Charles Parker of attempted sexual performance by a child under fourteen and assessed punishment at twenty years of imprisonment and a $10,000 fine. In two issues on appeal, Parker challenges the sufficiency of the evidence to support his conviction and the denial of his motion to quash the indictment. We affirm the trial court's judgment.

BACKGROUND

In March 2014, a grand jury indicted Parker for the offense of attempted sexual performance by a child under the age of fourteen. *See* Tex. Penal Code Ann. §§ 15.01, 43.25(b) (West 2011). In October 2015, the State amended the indictment to include a named complainant. The amended indictment alleged that on or about August 28, 2012, Parker

> did then and there, with the specific intent to commit the offense of Sexual Performance by a Child under 14, do an act, to-wit: request a person the defendant believed to be a child under the age of 14, namely, A.L., to make a sexually explicit video, amounting to more than mere preparation that tended to but failed to effect the commission of said offense[.]

Parker pleaded "not guilty" and proceeded to trial.

C.L., A.L.'s mother, testified that in 2012, A.L. was twelve years old and had a Facebook account. C.L. monitored A.L.'s Facebook account, and in 2012, C.L. noticed that Parker had posted several comments on A.L.'s Facebook page about how beautiful A.L.'s pictures were and that he would marry A.L. Parker also sent A.L. private messages through Facebook. C.L. testified that she became concerned when Parker sent A.L. his phone number, because after looking at Parker's profile page, C.L. realized he was an adult. C.L. explained that she was alarmed by the number of girls that Parker had on his Facebook page. C.L. discovered that Parker also used the name Johnny Pepper on Facebook, but Parker's profile picture, which

was a car, remained the same. According to C.L., when she asked A.L. if she knew that Parker was an adult, A.L. told her that she thought Parker was one of her friends from school. C.L. told A.L. not to associate with Parker or respond to any of Parker's comments.

C.L. explained that she did not tell A.L. to stop being friends with Parker on Facebook because C.L. intended to report Parker to the police. C.L. testified that Parker continued to send A.L. private messages stating how beautiful A.L. was and that he could only love her in his fantasy and just wait for A.L. until she was of age. C.L. contacted the police after Parker sent A.L. a video of Parker masturbating. C.L. explained that she spoke with Sergeant Arturo Looza. C.L. testified that she signed a consent form allowing the police to assume A.L.'s online identity by taking over A.L.'s Facebook account.

A.L. testified that in 2012, she had a Facebook account, and she had accepted Parker's friend request on Facebook because she thought Parker was a friend from her school. A.L. explained that she believed that the Parker on Facebook was "her friend Parker from school[,]" because she and Parker had several mutual friends on Facebook that included girls from her school. A.L. also explained that Parker's Facebook profile picture was a picture of a car and not of himself. A.L. did not talk to Parker through Facebook, but she noticed that Parker was commenting on her

posts. A.L. testified that she "didn't really think anything of it[,]" because Parker's comments included "stuff that other boys would post or other people would post." A.L. testified that when her mother confronted her about Parker's comments on her Facebook page and about Parker being an adult, A.L. explained to her mom that she thought Parker was just a boy from school.

At that point, A.L. and C.L. monitored A.L.'s Facebook account for "[m]essages that weren't good for a little girl from an older man or anything like that." A.L. testified that she was the first person to open the video that Parker sent of himself masturbating, and when she realized what it was, she turned it off and told her mother. A.L. testified that Parker also sent her his phone number. A.L. testified that she had not accessed Facebook since the incident with Parker occurred because it had frightened her and she no longer felt comfortable using Facebook. While A.L. knew that the police had taken over her Facebook account and pretended to be her to keep things going with Parker, A.L. did not know what had happened on her account after the police took it over.

Sergeant Arturo Looza with the Montgomery County Precinct 4 Constable's Office testified that in 2012, C.L. asked him to investigate a person who was communicating with A.L. on Facebook. Looza's investigation identified Parker as

the person. Looza prepared an offense report in which he transcribed everything that had been said on A.L.'s Facebook account.

Captain Mark Seals with the Precinct 4 Constable's Office testified that he is a working member of the Internet Crimes Against Children task force, which is part of the Houston Metro task force. Seals met with C.L. and A.L. and asked C.L. for consent to do an online takeover of A.L.'s Facebook account to continue the investigation of Parker. On July 16, 2012, Seals took over the account and began speaking with Parker, and based on Seals's review of the messages Parker had sent to A.L., Seals testified that he saw very early stages of grooming. Seals testified that based on the content of Parker's messages, Parker had some indication that the person with whom he was communicating was underage. Seals also explained that when Parker sent a message stating that "you seem like a girl who likes to smile all the time and have fun and kiss and make sweet love[,]" Seals responded, "'I am 12.'"

After Seals took over A.L.'s account, Parker sent another masturbation video in which Parker uses language that is similar to the language he used in his messages to A.L. According to Seals, he believed that the voice on the video was Parker's voice. Seals testified that Parker also sent A.L. a masturbation video through the Johnny Pepper Facebook account. Seals explained that the caption at the bottom of the video contained directions for using the video, which included instructions on

masturbation. Seals explained that when he commented on the video, Parker responded that he would make a video and call out A.L.'s name in it. Parker then sent A.L. a video titled, "[A.L.]'s Eyes Only[,]" in which Parker states, "'I hope you take this in your bed with you[.]'" When Seals commented that he could not see Parker's face in the video, Parker responded, "'[I] don't like putting my face on unless [yo]u made one for me, so dare [yo]u make one?[]'" According to Seals, Parker was trying to induce A.L. to make a videotape of herself masturbating and send it to Parker. When Seals indicated, "I don't have a web cam my mom said I can't have one till [I']m 15[,]" Parker offered several options to help get A.L. a gift card so that A.L. could buy a camera.

Seals testified that based on his investigation, he was able to obtain a warrant for Parker's arrest, and Parker was arrested in Texas. Seals further testified that he contacted Detective Paul Perry with the Louisiana State Police and requested that Perry obtain a search warrant to search Parker's apartment in Louisiana and seize any electronic equipment or media. Perry brought Parker's electronic equipment to Texas and obtained a search warrant to view Parker's electronic files. All of Parker's electronic equipment and files were taken to the Department of Homeland Security, and Special Agent Jeffrey Chappell, a computer forensic examiner, conducted the actual forensics search. Chappell testified that he found evidence that someone had

logged onto the Johnny Pepper Facebook profile using the computers that were seized from Parker's home. Chappell also found photographs of both Parker and A.L. saved on the computer's hard drive, as well as copies of the videos that Parker had sent to A.L. During his investigation, Chappell did not find any evidence showing that someone other than Parker, a/k/a Johnny Pepper, had sent the messages to A.L.

The jury found Parker guilty of attempted sexual performance by a child under fourteen. Parker appealed.

ANALYSIS

In issue one, Parker complains that the trial court erred by denying his motion to quash the indictment. According to Parker, his counsel timely filed a motion to quash the indictment complaining that the indictment was defective and failed to state an offense because it failed to include the required factual element of inducement. The trial court denied Parker's motion to quash the indictment, noting that Parker should have filed his motion prior to the day of trial. The trial court then proceeded to impanel and swear in the jury.

If the defendant fails to object to a defect, error, or irregularity of form or substance in an indictment "before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or

irregularity and he may not raise the objection on appeal[.]" Tex. Code Crim. Proc. Ann. art. 1.14(b) (West 2005). A trial on the merits begins when the jury is impaneled and sworn. *Sanchez v. State*, 138 S.W.3d 324, 329-3 (Tex. Crim. App. 2004). In this case, on the same day the jury was impaneled and sworn, Parker moved to quash the indictment for failing to state an offense. Thus, Parker waived his complaint and we overrule issue one. *See* Tex. Code Crim. Proc. Ann. art. 1.14(b); *Sanchez*, 138 S.W.3d at 329-30.

In issue two, Parker argues that the evidence is insufficient to support the jury's finding that he is guilty of attempting to commit the offense of sexual performance by a child under fourteen by making a request to A.L. to make a sexually explicit video. Parker argues that his simple request to make a sexually explicit video amounted to no more than mere preparation that tended to but failed to effect the commission of the offense. Parker maintains that all of his discussions with A.L. were online, and although he and A.L. had discussed making sexually explicit videos of each other, he never asked A.L. to forward him a sexually explicit video. According to Parker, his acts did not establish an attempt and, at most, amounted to mere preparation.

We review a challenge to the sufficiency of the evidence in the light most favorable to the verdict to determine if any rational trier of fact could have found the

essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010). The fact finder is the ultimate authority on the credibility of witnesses and the weight to be given their testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). We give deference to the jury's responsibility to fairly resolve conflicting testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). If the record contains conflicting inferences, we must presume that the fact finder resolved such facts in favor of the verdict and defer to that resolution. *Brooks*, 323 S.W.3d at 899 n.13; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

A person commits the offense of criminal attempt if, "with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." Tex. Penal Code Ann. § 15.01(a). A person commits the offense of sexual performance by a child, if "knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance." *Id.* § 43.25(b). Thus, "the offense of attempted sexual performance by a child is committed if: (1) the defendant; (2) with specific intent to commit sexual

performance by a child; (3) does an act amounting to more than mere preparation; (4) that tends but fails to effect the commission of sexual performance by a child." *Chen v. State*, 42 S.W.3d 926, 929 (Tex. Crim. App. 2001).

The Texas Court of Criminal Appeals has recognized that there is an "'imaginary line,' which separates 'mere preparatory conduct,' which is usually non-criminal, from 'an act which tends to effect the commission of the offense,' which is always criminal conduct." *Flournoy v. State*, 668 S.W.2d 380, 383 (Tex. Crim. App. 1984); *McCravy v. State*, 642 S.W.2d 450, 460 (Tex. Crim. App. 1980) (op. on reh'g). The law does not require that every act short of actual commission of the offense be accomplished for a defendant to be convicted of an attempted offense. *Gibbons v. State*, 634 S.W.2d 700, 706 (Tex. Crim. App. [Panel Op.] 1982). Where the imaginary lines are to be drawn depends on the nature of the crime attempted and must be considered on a case-by-case basis. *Id.* at 707; *Jones v. State*, 229 S.W.3d 489, 497-98 (Tex. App.—Texarkana 2007, no pet.).

Here, the criminal act element of the attempted offense entailed proof beyond a reasonable doubt that Parker committed an act amounting to more than mere preparation to induce A.L. to engage in a sexual performance, namely, by making a sexually explicit video. *See* Tex. Penal Code Ann. §§ 15.01(a), 43.25(b). The term "induce" is not defined by the statute, but Texas courts have used its commonly

understood meaning of "'to move and lead by persuasion or influence.'" *Ex parte Fujisaka*, 472 S.W.3d 792, 797 (Tex. App.—Dallas 2015, pet. ref'd).

In this statutory provision, the phrase "[s]exual performance" means "any performance or part thereof that includes sexual conduct by a child younger than 18 years of age." Tex. Penal Code Ann. § 43.25(a)(1) (West 2011). The phrase "[s]exual conduct" means "sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola." *Id.* § 43.25(a)(2) (West 2011). "'Performance' means any play, motion picture, photograph, dance, or other visual representation that can be exhibited before an audience of one or more persons." *Id.* § 43.25(a)(3). An offense under section 43.25(b) is a felony of the first degree if the victim is younger than fourteen years of age at the time the offense is committed. *Id.* § 43.25(c) (West 2011).

As discussed above, the jury heard testimony that Parker contacted A.L. on Facebook and began sending her inappropriate messages that were sexual in nature. The jury heard testimony that despite Parker knowing that A.L. was underage, he sent A.L. videos of himself masturbating and dared A.L. to make a similar video for

Parker. The jury also heard testimony that Parker offered to help A.L. purchase a webcam so A.L. could make a video.

Based on this record and viewing the evidence in the light most favorable to the verdict, we conclude that a rational finder of fact could have found, beyond a reasonable doubt, that Parker's acts amounted to more than mere preparation that tended to but failed to effect the commission of the offense of sexual performance by a child under fourteen. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 894-95. We conclude the evidence is sufficient to support Parker's conviction. We overrule issue two. Having overruled both of Parker's issues on appeal, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on January 5, 2017
Opinion Delivered April 19, 2017
Do Not Publish

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