In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-16-00438-CR

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JAMEY EHRON BRACK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 16-08-08858-CR

MEMORANDUM OPINION

Appellant Jamey Ehron Brack appeals his conviction for attempted sexual assault of a child, challenging the legal sufficiency of the evidence. We affirm the judgment as reformed.

Background

On August 2, 2016, a grand jury indicted Brack for attempted sexual assault of a child. The indictment alleged, in relevant part, that Brack engaged in the following criminal activity:

> . . . with the specific intent to commit the offense of Sexual Assault of a Child, do an act, to-wit: driving to the arranged meeting location with the specific intent to engage in sexual intercourse and deviate sexual intercourse with J. Serratt AKA "Becky", amounting to more than mere preparation that tended to but failed to effect the commission of said offense[.]

A jury trial was held on October 31 and November 1, 2016. Jerry Serratt, an investigator for Montgomery County Precinct 1 Constable's Office, testified for the State. Investigator Serratt explained that in his work with the Houston Metro Internet Crimes Against Children Task Force, he conducts online undercover investigations. Serratt testified that on May 9, 2016, he was working an online undercover investigation in Montgomery County in which he posted an advertisement to the personal section of Craigslist. Serratt read the ad aloud, which purported to be from a thirty-nine-year-old woman and stated "Daughter and I are looking for fun." The ad further stated that mother and daughter were "looking for fun[]" while the mother's husband was out of town. According to Investigator Serratt, he received an email response to the ad from Brack.

State's Exhibit 2 was admitted into evidence, and Serratt agreed it was a complete record of the emails exchanged between him and Brack that resulted from the ad on Craigslist. Serratt agreed that after Brack responded to the ad, Serratt informed him that the daughter referred to in the ad, "Becky," was fifteen years old. Serratt explained that after a few email exchanges, Brack explained his desire to

engage in sexual activity with both mother and daughter at the same time. According to Serratt, Brack attached a photograph of himself to one of the emails, and Serratt identified Brack as the person in the photograph.

Serratt testified that, at some point, the communications migrated to text messages, and a copy of the text messages were admitted into evidence. Serratt also testified that Brack inquired how experienced "Becky" was and whether she used birth control. According to Serratt, Brack eventually explained the sex positions he wanted to use with both the mother and "Becky," which included genital penetration. Serratt explained that, at one point, Brack expressed concern whether "this isn't some kind of sting operation[,]" and in response, Serratt denied that it was. Serratt also testified that during the conversations, Serratt made comments that would have given Brack a chance to back out. Serratt texted Brack the address of an apartment, which was where the undercover operation was working that night, and Brack responded that he would be there in about thirty minutes and that he would bring condoms.

Serratt testified that Brack texted at about 12:29 a.m. that he was "Here[]" at the apartment location. According to Serratt, Brack stood at the front door of the apartment for a while before texting "[w]ould you come let me in?" Serratt explained that, as Brack waited near the front porch of the apartment, a team of investigators

took him into custody. A video recording of the team apprehending Brack was admitted into evidence and published to the jury. Serratt also testified that the investigators recovered condoms from Brack that night.

Investigator Serratt explained that he informed Brack of his *Miranda* rights and interviewed him, and Brack said he had gone to the apartment to have oral sex with both the mother and "Becky," whom Brack acknowledged to be fifteen and "underage." Serratt testified that this interview was recorded, and the recorded interview was admitted into evidence and published to the jury.

The defense rested without offering witnesses or evidence. The jury found Brack guilty of attempted sexual assault of a child as charged in the indictment, assessed punishment at three years' confinement, and recommended community supervision. The court suspended imposition of the sentence and placed Brack on community supervision for five years.

Issue on Appeal

In a single issue, Appellant argues that the evidence is legally insufficient to support his conviction. According to Appellant, the evidence is legally insufficient because the act of driving—the act alleged in the indictment—"does not have a sufficient nexus to the commission of a sexual assault[]" and that the evidence falls short of proving attempt, although it may show intent or preparation. Appellant

argues that driving to a location is a "benign act" that does not tend to induce, begin, or effect the commission of the crime of sexual assault. Appellant also argues that the State failed to prove that Investigator Serratt was "Becky" as alleged in the indictment or that Brack contacted "Becky."[1]

Standard of Review

We review a legal sufficiency challenge applying the standard established in *Jackson v. Virginia*. *See* 443 U.S. 307, 318-19 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under this standard, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *See Cary v. State*, 507 S.W.3d 761, 766 (Tex. Crim. App. 2016) (quoting *Jackson*, 443 U.S. at 319); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

In reviewing the sufficiency of the evidence, we may look at "events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985). Each fact need

[1] Appellant does not argue that the indictment was defective or that there was error in the jury charge.

not point directly and independently to the appellant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *See Hooper*, 214 S.W.3d at 13 (citing *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993); *Barnes v. State*, 876 S.W.2d 316, 321 (Tex. Crim. App. 1994); *Alexander v. State*, 740 S.W.2d 749, 758 (Tex. Crim. App. 1987)). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

Due deference must be afforded to the jury's responsibility "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (quoting *Hooper*, 214 S.W.3d at 13). We therefore resolve all reasonable inferences in favor of the jury's verdict. *Tate v. State*, 500 S.W.3d 410, 417 (Tex. Crim. App. 2016).

Applicable Law

A person commits the offense of attempted sexual assault of a child if, with the specific intent to commit the offense of sexual assault of a child, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the intended offense. *See* Tex. Penal Code Ann. §§ 15.01(a) (West

2011), 22.011(a)(2)(A) (West Supp. 2017);[2] *Chen v. State*, 42 S.W.3d 926, 930 (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. 1982) (op. on reh'g); *Sorce v. State*, 736 S.W.2d 851, 857 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd). 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 ("Convictions for attempted offenses under 15.01 [] must necessarily be considered on a case-by-case basis."); *Adekeye v. State*, 437 S.W.3d 62, 68-69 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd); *Jones v. State*, 229 S.W.3d 489, 497-98 (Tex. App.—Texarkana 2007, no pet.); *Sorce*, 736 S.W.2d at 857. A person's intent to commit an offense

[2] We cite to the current version of statutes, as subsequent amendments do not affect the disposition of this appeal.

may be established by circumstantial evidence and may be inferred from the person's acts, words, and conduct, as well as from the surrounding circumstances. *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *Lindsey v. State*, 764 S.W.2d 376, 378 (Tex. App.—Texarkana 1989, no pet.).

Analysis

In this case, the State produced transcripts of numerous sexually explicit online conversations that Brack had with a person whom Brack believed was the mother of a fifteen-year-old girl, "Becky." During the conversations, Brack made several statements that the jury could infer were evidence of Brack's intent to commit the offense, including explicit details of how he wished to have sex with "Becky" and her mother and an inquiry as to whether "Becky" used birth control. On the day he had arranged to meet "Becky," Brack texted several messages prior to departing for the arranged location and stated that he would bring condoms. After the conversations, Brack traveled to the agreed-upon meeting place. The jury also heard evidence that, once Brack arrived at the location, Brack texted Investigator Serratt and asked "[w]ould you come let me in?" From this evidence, the jury could have inferred that Brack intended to proceed with sexual activity with both the "mother and daughter." Furthermore, investigators found condoms on Brack,

consistent with Brack having texted that he intended to bring condoms with him and from which the jury could have inferred intent to have sex.

Considering all the evidence in context, the jury could reasonably infer that Brack engaged in online conversations about having sex with "Becky" and her mother, drove to the apartment, and brought condoms with the specific intent to engage in sexual intercourse with someone whom he believed to be a fifteen-year-old child. When viewing the evidence in the light most favorable to the verdict, we conclude that the State proved beyond a reasonable doubt that Brack had the specific intent to commit the offense of sexual assault of a child, and that he committed an act amounting to more than mere preparation that tended but failed to effect the commission of the offense. *See generally Chen*, 42 S.W.3d at 930 (evidence that defendant engaged in online communication regarding plans to have sex, agreed to meet at a motel, drove to and arrived at the motel, and brought condoms as he had planned was legally sufficient to support conviction for attempted sexual performance by a child); *Schemm v. State*, 228 S.W.3d 844, 846 (Tex. App.—Austin 2007, pet. ref'd) ("By arranging to meet 'Jessie' for the purpose of sexual intercourse and then driving to the meeting place at the appointed time, appellant took every possible step he could have taken under the circumstances to commit the offense of sexual performance by a child. . . . Appellant's assertion that the act of driving [to

the agreed-upon meeting site] did not constitute a part of the alleged offense is without merit."); *Hall v. State*, 124 S.W.3d 246, 252 (Tex. App.—San Antonio 2003, pet. ref'd) (concluding the evidence, which included defendant's drive to meet a fourteen-year-old child, was legally sufficient to support inference of intent to engage in criminal solicitation of a minor).[3] We conclude the evidence presented at trial, reviewed in the light most favorable to the verdict, was sufficient for the trier

[3] *See also Coe v. State*, Nos. 09-13-00409-CR & 09-13-00410-CR, 2015 Tex. App. LEXIS 6374, **at 20-22 (Tex. App.—Beaumont June 24, 2015, pet. ref'd) (mem. op., not designated for publication) (concluding that, viewed in context, evidence of online conversations and arrival at an agreed location with condoms was sufficient to support conviction of attempted sexual assault of a child); *Patton v. State*, No. 05-08-00574-CR, 2009 Tex. App. LEXIS 3713, at **4-5 (Tex. App.—Dallas May 26, 2009, pet. ref'd) (mem. op., not designated for publication) ("From the transcripts of appellant's online communications with ["Stacie"] and his three-and-a-half-hour drive from his home to the agreed-upon meeting place, the jury could reasonably infer that appellant had the specific intent to engage in sexual intercourse with a child whom he believed to be ten years old."); *Ashcraft v. State*, Nos. 03-06-00310-CR & 03-06-00311-CR, 2008 Tex. App. LEXIS 5823, at **15-18 (Tex. App.—Austin July 31, 2008, no pet.) (mem. op., not designated for publication) (concluding that evidence of online communication, driving to a pre-arranged location, and certain items in defendant's vehicle, taken as a whole and in context provided legally sufficient evidence of attempted sexual assault of a child); *Smith v. State*, Nos. 03-05-00399-CR & 03-05-00400-CR, 2006 Tex. App. LEXIS 2062, at **15-18 (Tex. App.—Austin Mar. 16, 2006, pet. ref'd) (mem. op., not designated for publication) (The court concluded that appellant's sexually explicit online communications with "jessiegurl323" together with appellant's act of driving to an agreed-upon location constituted more than mere preparation and was legally sufficient to support his convictions for attempted sexual performance by a child and attempted aggravated sexual assault. The court also explained that "the specific act of driving to the agreed-upon meeting place is corroborative action. Such conduct goes beyond remote preparatory activity and confirms a criminal design.").

of fact to reasonably conclude that appellant was guilty of attempted sexual assault of a child. *See Cary*, 507 S.W.3d at 766; *Chen*, 42 S.W.3d at 930.

Appellant's argument that the State failed to prove that Investigator Serratt was "Becky" or that Brack made contact with "Becky" is also unavailing. Serratt testified that he was part of the Online Task Force and that the Task Force posted an ad online and provided the jury with the details of the ad. The State was not required to prove direct communication with "Becky" or that he was "Becky." The offense charged was not online solicitation of a minor. *See* Tex. Penal Code Ann. § 33.021 (West 2011); *see also Ex parte Victorick*, 453 S.W.3d 5, 12 (Tex. App.—Beaumont 2014, pet. ref'd) ("A person commits the offense of online solicitation of a minor if the person 'over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.'") (quoting Tex. Penal Code Ann. § 33.021(c)). The State presented evidence of each of the necessary elements of attempted sexual assault of a child. The evidence was sufficient to establish proof of intent and of an act that amounted to more than mere preparation. *See* Tex. Penal Code Ann. §§ 15.01(a), 22.011(a)(2)(A); *Chen*, 42 S.W.3d at 930.

While not articulated as a discrete issue on appeal, Appellant also argues that the First Amendment protects thoughts and fantasies that may nonetheless evince criminal intent and that "[t]o allow Mr. Brack's conviction to stand[] criminalizes his thought process that may rise to criminal intent without a true overt act tending to effect a sexual assault." As we have explained herein, the evidence of Brack's overt conduct—including numerous sexually explicit online and text messages, driving to the agreed-upon meeting site in possession of condoms, and requesting "[w]ould you come let me in?"—provides legally sufficient evidence to support the jury's verdict and Brack's conviction. Appellant provides no citation to the record or legal authority for his contention that he was convicted for his "thought process[.]" We find Appellant's First Amendment argument insufficiently briefed and unpersuasive. *See* Tex. R. App. P. 33.1(a) (requiring issues to be raised and ruled on by the trial court in order to preserve them for appellate review), 38.1(i) (an appellate brief must provide citations to the record and to legal authority); *see also Loftin v. Lee*, 341 S.W.3d 352, 356-57 n.11 (Tex. 2011) (a party that did not raise constitutional issues in the trial court cannot argue them on appeal). We overrule Appellant's issue.

Reformation of Judgment

We note that the section of the judgment entitled "Statute for Offense[]" recites "33.021(c)[.]" Section 33.021(c) of the Texas Penal Code defines the offense of online solicitation of a minor, whereas Brack's indictment indicates he was indicted for attempted sexual assault of a child, and the offense of sexual assault of a child is codified at section 22.011 of the Texas Penal Code. *See* Tex. Penal Code Ann. §§ 33.021(c), 22.011. The jury charge also tracks the statute for sexual assault of a child. This Court has the authority to reform the trial court's judgment to correct clerical errors. *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993). We therefore reform the judgment to delete the reference to "33.021(c)" and to add a citation to "22.011" to that section of the judgment stating the statutory reference for the offense.

Having overruled Appellant's issue, we affirm the judgment of the trial court as reformed.

AFFIRMED AS REFORMED.

LEANNE JOHNSON
Justice

Submitted on January 4, 2018
Opinion Delivered January 31, 2018
Do Not Publish

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