COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00273-CR

LEE RANDAL HUGHES — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 97TH DISTRICT COURT OF MONTAGUE COUNTY
TRIAL COURT NO. 2013-0135M-CR

MEMORANDUM OPINION[1]

A jury convicted Appellant Lee Randal Hughes of the offense of criminal solicitation of a minor and assessed his punishment at twenty years in the penitentiary and a fine of $10,000. The trial court sentenced Appellant accordingly. On appeal, Appellant brings two points. First, he argues the evidence is insufficient to support his conviction. Second, he asserts that the trial

[1]*See* Tex. R. App. P. 47.4.

court erred by admitting Complainant's forensic interview into evidence. We affirm.

I. The Indictment

In the indictment, the State alleged that Appellant, on or about July 10, 2013, in Montague County, Texas, with the intent that aggravated sexual assault of a child younger than fourteen years of age under section 22.021 of the Texas Penal Code be committed, did request, command, or attempt to induce Complainant, an individual younger than seventeen years of age, to engage in specific conduct, to-wit: allow Appellant's sexual organ to contact or penetrate the mouth or anus of Complainant and that under the circumstances surrounding the conduct of Appellant, as Appellant believed them to be, would have constituted aggravated sexual assault of a child younger than fourteen years of age. *See* Tex. Penal Code Ann. §§ 15.031(a), 22.021(a)(1)(B), (a)(2)(B) (West Supp. 2016).

II. The Complainant's and His Two Companions' Testimony

When he was eleven years old, Complainant lived in Bowie and was in the seventh grade at Bowie Junior High School. He hung out with his two friends, E. and A., in July 2013. Photographs of Complainant at the age of eleven were admitted into evidence.

Complainant testified at trial that Appellant lived in his neighborhood. One day, Complainant saw Appellant walking by, and Complainant's friend, E., asked him to ask Appellant for $5, so Complainant did. Appellant told Complainant that

he had the money at his house. Complainant followed Appellant to his house, where Appellant went inside, came back out onto the porch, gave Complainant the money, and told him to pay it back as soon as he could. Complainant gave the money to E.

A couple of months later, before Complainant went back to school, Complainant went to A.'s to see if A. wanted to play and saw A., E., D., and Appellant on the street. A. and E. were pulling D. in a wagon. A. and E. told Complainant that Appellant wanted to talk to him. Appellant told Complainant to follow him, so Complainant followed Appellant to his house where Appellant began talking to Complainant on Appellant's front porch.

Appellant told Complainant that for every day he did not pay back the debt, Appellant was going to add a dollar to it. Complainant did not have the money, but he did not tell Appellant that. Complainant had asked E. to pay Appellant.

Complainant testified that Appellant then explained to him that instead of paying him back, he had four choices. The first option was Complainant could pull down his pants, and Appellant would give Complainant forty-six whippings. The second choice was to go into Appellant's house, watch pornographic videos, and then mess around. By "mess around," Complainant thought Appellant meant he wanted to "kiss and stuff." Complainant said that he had never seen a pornographic movie before but had heard about them from an older friend. At this point, they went inside Appellant's house.

Appellant showed Complainant where his bedroom was. Once inside the bedroom, Appellant closed the door. Appellant then explained Complainant's last two options. The third option was that Appellant would teach Complainant how to "suck his dick." Complainant knew Appellant was referring to his front private part. The fourth choice was for Appellant to go to Complainant's house where Appellant would hold Complainant's family hostage with a gun and slit Complainant's throat with a knife. Complainant saw a knife under Appellant's mattress sticking out. Complainant thought Appellant was serious because Appellant was not laughing and had a serious face. Complainant said he was scared and crying.

A pornographic video was playing on the TV in front of Appellant's bed. Complainant had never seen pornography before. He said he heard "[m]oaning and stuff" and saw a naked man and woman on the TV "messing around" on a bed. Appellant kept telling Complainant to look at the TV.

Complainant said he chose the second option, to watch pornography and mess around. At that point, Complainant's friends knocked at the door, and Appellant said, "I think that's for you." Before Complainant left the room, Appellant told him to pull down his pants quickly, but Complainant refused. Complainant walked out of the bedroom. Through the screen door, he saw A. and E. standing on the porch by the steps. Complainant went outside. Complainant said he was "[k]ind of" still crying. Appellant followed Complainant outside and told A. and E. that they were just looking at guns. At trial,

Complainant denied seeing any guns inside. Complainant testified that E. knew he was upset because E. commented that his face was red like he had been crying and told Complainant that he knew something was wrong.

Complainant then went by himself to his house and told his older brother that a man had threatened him, but his brother was "in his game" and did not do anything. Complainant thought his father was home asleep, but he did not tell his father because he knew his father did not like to be awakened. Complainant then went to A.'s house, where both A. and E. were, and then they went to E.'s house where Complainant was planning on spending the night. At E.'s house, Complainant first told A. and E. what happened. Complainant did not want to tell E.'s mother because Complainant was afraid of getting in trouble, but he agreed to let A. and E. tell E.'s mother.

E.'s mother, her friend, A., E., and Complainant then drove by Appellant's house so Complainant could show them where Appellant lived. E.'s mother and her friend then dropped the children back off at her house, and she and her friend then went back to Appellant's house. Complainant said E.'s mother's friend made a video on his phone of their confrontation with Appellant. Complainant testified that he then called his father and told him and that E.'s mother called the police, after which a policeman came to E.'s mother's house and spoke to her. The policeman and Complainant then went to Complainant's house where the policeman told Complainant's father. Complainant testified that the policeman never interviewed him. Complainant said that he never spoke to

E.'s mother about it either, other than to tell her it had happened that day. Complainant said his father did not ask him about it, but later he went to Patsy's House Children's Advocacy Center and spoke to someone named Shannon. Complainant testified that all the events he described happened when he was eleven years old.

E. testified that Complainant and he were friends in the summer of 2013. E. testified that he remembered the day he saw Complainant come out of Appellant's house that summer. E. described Complainant as sad, like "he had just got done crying." E. testified that Complainant's cheeks were red. That was the only time E. had seen Complainant in Appellant's house.

A. testified that in July 2013, he was Complainant's friend from the neighborhood. A. recalled the one time he saw Complainant in Appellant's house. A. testified that when Complainant came out of the house, he looked sad, "[l]ike he was about to cry." A. recalled that Appellant had talked to him only once, when he asked him and E. if they had seen Complainant because Complainant owed him money. Appellant talked to them before they saw Complainant in his house, but A. thought it was on a different day.

III. Sufficiency of the Evidence

In his first point, Appellant contends that the evidence is insufficient to support his conviction in two respects. First, he asserts that there is no evidence he knew Complainant was a child under fourteen years of age. Second, he argues there is no evidence he specifically intended his sexual organ to contact

or penetrate the mouth or anus of Complainant because he offered Complainant the choice of a number of different options.

A. Standard of Review

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict 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, 2789 (1979). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* at 319, 99 S. Ct. at 2789; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448. We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49. The standard of review is the same for direct and

circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

B. Discussion

1. Whether Appellant Believed Complainant was Under Fourteen Years Old

The indictment's language, "under the circumstances surrounding the actor's conduct as the actor believes them to be," is the focus of Appellant's first argument. *See* Tex. Penal Code Ann. § 15.031(a). Appellant contends that there was no evidence that he believed Complainant to be under fourteen years old.

The language "under the circumstances surrounding the actor's conduct as the actor believes them to be" has been applied in instances when a defendant solicits someone he believes to be a minor but who is not. For example, in *Chen v. State*, the defendant solicited a detective posing as a fifteen-year-old girl on the internet. No. 05-05-00206-CR, 2006 WL 1085729, at *1 (Tex. App.—Dallas 2006, pet. ref'd) (not designated for publication). And in *Hall v. State*, the defendant solicited through on-line communications and telephone conversations three police officers who collectively were posing as a teenage girl. 124 S.W.3d 246, 247 (Tex. App.—San Antonio 2003, pet. ref'd).

The language "under the circumstances surrounding the actor's conduct as the actor believes them to be" has also been applied in instances when a

defendant solicits someone who was, in fact, under seventeen years old at the time of the offense but the defendant argues he did not believe the complainant was under seventeen. For example, in *Henson v. State*, the complainant was sixteen at the time of the offense. 173 S.W.3d 92, 101 (Tex. App.—Tyler 2005, pet. ref'd). The defendant successfully argued that there was insufficient evidence to show he believed the complainant was under seventeen at the time of the solicitation. *Id.* at 103–04.

The State argues that when the complainant is, in fact, underage, it does not need to show that the defendant knew the complainant was under seventeen years old for sexual assault or under fourteen years old for aggravated sexual assault. Normally, even a very reasonable mistake of fact with respect to the child's age is not a defense to sex offenses. *See Vasquez v. State*, 622 S.W.2d 864, 865–66 (Tex. Crim. App [Panel Op.] 1981) (stating that, under well-established Texas law, it has consistently been held that an underage female was deemed in law "to be incapable of consenting to an act of sexual intercourse, and one who had committed the act on her was guilty of rape, notwithstanding the fact that he had obtained her actual consent, or was ignorant of her age"). We need not, however, resolve that issue in this case.

We have reviewed the photos of Complainant when he was eleven years old, and he looks very much like a prepubescent child. Viewing the evidence in the light most favorable to the verdict, we hold that a rational trier of fact could

have found that Appellant knew Complainant was under fourteen at the time of the offense. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

2. Whether Appellant Solicited Complainant to Allow Appellant's Sexual Organ to Contact or Penetrate Complainant's Mouth or Anus

In the indictment, the State alleged that Appellant solicited Complainant to allow Appellant's sexual organ to contact or penetrate Complainant's mouth or anus. Neither the indictment nor the statute requires the child to accept. *See* Tex. Penal Code Ann. § 15.031(a). Appellant solicited Complainant to, among other options, "suck his dick" in lieu of repayment. Simply because Complainant chose another option does not change the fact that Appellant asked to penetrate Complainant's mouth with Appellant's sexual organ. Viewing the evidence in the light most favorable to the verdict, we hold that a rational trier of fact could have found that Appellant solicited Complainant as alleged. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

We overrule Appellant's first point.

IV. The Admission of the Forensic Interview

In his second point, Appellant argues that the trial court erred by admitting the forensic interview of Complainant. Appellant contends that the video was inadmissible hearsay and that he was substantially harmed by its admission.

We review a complaint of improper admission of evidence under an abuse of discretion standard. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000); *Garcia v. State*, 237 S.W.3d 833, 836 (Tex. App.—Amarillo 2007, no

pet.). We uphold the trial court's ruling if the admission was within the zone of reasonable disagreement. *Id.*

At trial, Appellant did not object to the testimony of the forensic interviewer. As for the video, Appellant did not object on the basis of hearsay. Appellant made the following objection:

> I believe the tape is bolstering the State's witness. I believe that the tape is repetitious of prior testimony that's already been offered. I believe that the tape is a duplication of prior testimony and I believe that—that it doesn't add anything other than what's already been testified to here.

When asked if he had any additional objections, Appellant stated that he did not. When the video was admitted, he expressly stated he had no additional objections.[2]

The complaint made on appeal must comport with the complaint made in the trial court or the error is forfeited. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012); *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009) ("A complaint will not be preserved if the legal basis of the complaint raised

[2]As we read his objection, his objection was that the probative value of the evidence was substantially outweighed by a danger of undue delay or the needless presentation of cumulative evidence. *See* Tex. R. Evid. 403; *see also Cohn v. State*, 849 S.W.2d 817, 821–22 (Tex. Crim. App. 1993) (Campbell, J., concurring) (stating that "bolstering" evidence, assuming it is relevant, is generally admissible under rules of evidence; "bolstering" objection is no longer adequate to preserve error; and party seeking exclusion must object in accordance with the rules of evidence, such as the evidence is not relevant under rule 402 or the evidence is substantially prejudicial, confusing, or needlessly cumulative under rule 403, or otherwise specify a rule or a reason found in the rules).

on appeal varies from the complaint made at trial."); *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("Whether a party's particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial."). To determine whether the complaint on appeal comports with that made at trial, we consider the context in which the complaint was made and the parties' shared understanding at that time. *Clark*, 365 S.W.3d at 339; *Resendez v. State*, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009); *Pena*, 285 S.W.3d at 464. Because Appellant's hearsay complaint on appeal does not comport with his objection at trial, we hold he has forfeited his complaint.

We overrule Appellant's second point.

V. Conclusion

Having overruled both of Appellant's points, we affirm the trial court's judgment.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: DAUPHINOT, GARDNER, and MEIER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 20, 2016