In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00276-CR

OMAR REYES, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 16th District Court
Denton County, Texas
Trial Court No. F18-491-16

Before Gabriel, Kerr, and Birdwell, JJ.
Memorandum Opinion by Justice Gabriel

MEMORANDUM OPINION

Appellant Omar Reyes appeals from his conviction and life sentence for continuous sexual abuse (CSA) of Jill Taylor,[1] a child under the age of fourteen. In two issues, he argues that the evidence was insufficient to show that the alleged acts of sexual abuse occurred over at least a thirty-day period and that the trial court abused its discretion by admitting three drawings Jill made illustrating what had happened to her. Because the evidence sufficiently established the required time frame for the alleged acts and because any admission of the drawings did not affect Reyes's substantial rights, we affirm the trial court's judgment.

I. BACKGROUND

At the end of her third-grade year in May 2017, eight-year-old Jill was living with Joan Smith, her grandmother, and Reyes, also a relative. At that time, Reyes touched Jill's sexual organ with his hand inside her clothes.[2] Jill remembered it was May 2017 because she had taken the STAAR test at school, which had been given on May 8 and 9. Reyes did this to Jill "a lot of times," sometimes penetrating her sexual

[1]We use aliases to refer to the child complainant and her relatives other than Reyes. *See* Tex. R. App. P. 9.8 cmt., 9.10(a); Tex. App. (Fort Worth) Loc. R. 7.

[2]Jill referred to her female sexual organ as "that place," which she affirmed was the "place that [she] use[s] to go to the restroom." When the State asked her to circle on a drawing of a girl where Reyes had touched her, she circled the female sexual organ.

organ with his finger. Although Jill asked Reyes to stop, Reyes would not. Reyes also "touched" Jill with his sexual organ and put his sexual organ inside Jill's sexual organ.[3]

The last time Reyes made Jill "uncomfortable," she was nine years old and in the fourth grade. On October 12, 2017, Jill told her fourth-grade teacher that she had seen blood in the toilet when she went to the restroom. Jill, seeming "excited" that she had apparently had her first period, told her teacher that Reyes would not touch her while she was bleeding: "It was like a shield." Jill explained that Reyes would touch her "private areas" and would put his "private parts . . . into her private parts." She also told her teacher that Reyes had once asked Jill to put "his private" into her mouth, but someone walked into the room. Jill's teacher sent her to the school counselor. The counselor gave Jill the option to draw while they were talking. Jill drew two pictures, apparently illustrating some of the sexual abuse.

After the police arrived, Jill was taken to a hospital for a sexual-assault examination. Jill told the sexual-assault nurse examiner (SANE) that Reyes had played with her belly button while they were lying on a bed, which Jill stated was the "first time." Another time, Reyes unbuttoned Jill's pants, put his hands "down there," and put his fingers inside her "private parts." Jill also recounted to the SANE that Reyes had "put his private in [her] private part" and forced her to "squeeze his private" with her hand. These happened in his bedroom or the living room. Jill would "squirm to

[3]Again, Jill circled a male sexual organ on a picture when asked what Reyes had touched her with.

try to get away" and would tell Reyes to stop to no avail. Jill stated that on October 10, 2017—two days before she talked to her teacher—Reyes had attempted to put his sexual organ in Jill's mouth, but Jill refused. Reyes grabbed Jill's arm and eventually rubbed his sexual organ on Jill's sexual organ. Reyes also "lick[ed] his fingers and rub[bed] it on [Jill] in [her] privates." Jill also told the SANE that she had bitten Reyes "maybe a week ago." The SANE noted that Jill had "[a]cute genital trauma" and "[a]cute physical trauma." Although the SANE collected forensic evidence during the exam, there was no DNA that could be tested.

The next day, Ashley Enslow, a forensic interview supervisor with the Child Advocacy Center, interviewed Jill.[4] During the interview, Enslow asked Jill "to draw a picture of a specific incident that had occurred." This picture, similar to the pictures Jill had drawn for the school counselor, showed Reyes and Jill apparently naked in bed together.

Reyes was indicted for CSA, occurring between May 1 and October 12, 2017. *See* Tex. Penal Code Ann. § 21.02(b). To meet the statutory requirement of "two or more acts" of sexual abuse against Jill, the indictment alleged that Reyes (1) touched Jill's genitals with the intent to arouse or gratify his sexual desire; (2) caused Jill to touch his genitals with the intent to arouse or gratify his sexual desire; (3) intentionally or knowingly penetrated Jill's sexual organ with his finger; (4) intentionally or

[4]This interview was the result of a referral from either the Department of Family and Protective Services or law enforcement.

knowingly caused Jill's sexual organ to contact his sexual organ; or (5) intentionally or knowingly caused Jill's mouth to contact his sexual organ. *Id.* § 21.02(b)(1), (c). At trial, Jill, the SANE, and Jill's teacher all testified about the alleged acts of sexual abuse, and the trial court admitted Jill's drawings over Reyes's hearsay objection. Jill's younger sister Ann also testified that once when she and Reyes were playing "the tickling game" on Reyes's bed, Reyes's hands "went the wrong way" and contacted her sexual organ over her clothes. This made Ann "[u]ncomfortable."

A jury convicted Reyes of CSA and assessed his punishment at life confinement. On appeal, Reyes argues that because no evidence shows that the sexual abuse occurred "during a period that is 30 or more days in duration," his conviction is supported by insufficient evidence. *Id.* § 21.02(b)(1). He also argues that the admission of Jill's drawings was an abuse of discretion because they were inadmissible hearsay. *See* Tex. R. Evid. 801–02.

II. SUFFICIENCY OF THE EVIDENCE

In our due-process review of the evidence, we view all the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). We must defer to the fact-finder's exclusive responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Zuniga v. State*, 551 S.W.3d 729, 732–33 (Tex. Crim. App.

2018). Although a fact-finder may not speculate, it may draw reasonable inferences from the supported facts. *Id.* at 733.

Reyes's sufficiency argument focuses on his assertion that only two temporal references are found in the evidence: (1) Jill told the SANE that Reyes had first touched her in May 2017 when he "played with [her] belly button" and (2) Jill testified that the last time Reyes committed sexual abuse was October 10, 2017. Reyes contends that because the first instance was not an act of sexual abuse, no evidence shows that two of the alleged acts of sexual abuse occurred thirty or more days apart as the jury was charged to find before convicting. *See* Tex. Penal Code Ann. § 21.02(b)(1), (c).

Reyes relies on a 2017 opinion in which we held that the evidence to support a CSA conviction was insufficient. *Hines v. State*, 551 S.W.3d 771, 779–80 (Tex. App.—Fort Worth 2017, no pet.). To mark the beginning of the defendant's sexual abuse in *Hines*, the complainant testified that she had started "dating" the defendant in August and that the last act of sexual abuse had occurred on September 23. *Id.* at 779–80. We held that this evidence was insufficient to set the beginning date for purposes of CSA because there was "no evidence from which the jury could have inferred that by 'dating,' [the complainant] meant the sexual activity had started." *Id.* But, here, contrary to Reyes's assertion that the evidence shows only two temporal links, Jill testified that Reyes had touched her sexual organ with his hand—an act of sexual abuse, *see* Tex. Penal Code Ann. §§ 21.02(c), 21.11(a)(1), (c)(1)—during the time she

had taken the STAAR test at school when she was in the third grade. Jill's school principal testified that the STAAR test that year had been given on May 8 and 9, 2017. Jill told the SANE that the last time Reyes had sexually abused her was on October 10, 2017, when he rubbed his sexual organ on Jill's sexual organ and put his fingers in her sexual organ. Jill was in the fourth grade when this occurred. Jill stated that Reyes sexually abused her "a lot of times." This testimony regarding the duration of the sexual abuse allowed the jury to reasonably infer that Reyes sexually abused Jill for a period that lasted thirty days or more. *See, e.g.*, *Hernandez v. State*, No. 05-17-00560-CR, 2018 WL 2316026, at *3–4 (Tex. App.—Dallas May 22, 2018, pet. ref'd) (mem. op., not designated for publication); *Lawson v. State*, No. 02-17-00201-CR, 2018 WL 1192478, at *5 (Tex. App.—Fort Worth Mar. 8, 2018, no pet.) (mem. op., not designated for publication) (per curiam); *Brown v. State*, No. 03-16-00011-CR, 2017 WL 876029, at *4–5 (Tex. App.—Austin Feb. 28, 2017, pet. ref'd) (mem. op., not designated for publication).

Reyes discounts the STAAR-test marker because Jill had told the SANE that the "first time" Reyes made her uncomfortable was when he touched her stomach, which was not an act of sexual abuse. But whether Jill stated that the May 2017 incident involving Reyes's putting his hand on her sexual organ was the first time or the second time he had touched her in some way is unimportant. What is important is that the evidence sufficiently showed that Reyes sexually abused Jill in May 2017, sexually abused her again in October 2017, and similarly sexually abused her "a lot of

times." We recognize that because Jill was eight when the abuse started and ten when she testified at trial, she was unable to articulate the sexual abuse in a detailed manner. But Jill was able to recount for the SANE and to testify with sufficient specificity how, when, and where Reyes sexually abused her such that due process is satisfied. Accordingly, the evidence was sufficient to support his CSA conviction, and we overrule Reyes's first issue.

III. ADMISSION OF JILL'S DRAWINGS

In his second issue, Reyes argues that the trial court abused its discretion by admitting the three drawings Jill made when she spoke with the school counselor and Enslow. He contends that because the drawings were offered to prove the truth of the matter asserted (that Reyes sexually abused Jill) and because they did not qualify as an exception to the hearsay rule, they were inadmissible. *See* Tex. R. Evid. 801(d), 802. He then asserts that admission of the drawings was harmful because "they were done by the complainant's own young hand" and were thus "exceptionally prejudicial." The State seems to concede that the drawings were inadmissible hearsay, arguing only that any error in their admission must be disregarded because Reyes's substantial rights were not affected.[5] *See* Tex. R. App. P. 44.2(b).

[5]We do not hold that the trial court abused its discretion by admitting the drawings. We merely proceed to a harm analysis without first determining error. *See, e.g.*, *Wooten v. State*, 400 S.W.3d 601, 607 (Tex. Crim. App. 2013).

If hearsay evidence is erroneously admitted, we must disregard the error unless the defendant's substantial rights were affected. *See id.*; *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). A defendant's substantial rights are affected if the admission had a substantial or injurious influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Jill testified that Reyes had sexually abused her. Jill's teacher, as the designated outcry witness, testified to what Jill had told her about the sexual abuse. The SANE also testified to what Jill had told her about the sexual abuse. The drawings were cumulative of this evidence and were less detailed. Additionally, they were no more prejudicial in their nature than the other testimony about Reyes's acts. Under these circumstances, we cannot conclude that Reyes's substantial rights were affected by the admission of the drawings and, thus, must disregard the error, if any. *See Prestiano v. State*, 581 S.W.3d 935, 946–47 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (op. on reh'g); *see also Petty v. State*, 346 S.W.3d 200, 207 (Tex. App.—Amarillo 2011, no pet.). We overrule issue two.

IV. CONCLUSION

The totality of the evidence was sufficient to allow a reasonable jury to find that Reyes sexually abused Jill more than once during a period that spanned thirty days or more. The admission of Jill's drawings of Reyes's actions, even if an abuse of discretion, did not affect Reyes's substantial rights because the drawings were cumulative of Jill's and others' testimony about the facts of the abuse. Thus, we must

disregard any error arising from their admission. We overrule Reyes's issues and affirm the trial court's judgment.

/s/ Lee Gabriel

Lee Gabriel
Justice

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Tex. R. App. P. 47.2(b)

Delivered: May 7, 2020