In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00231-CR

BRIAN JAMES SWINNEY, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 396th District Court, Tarrant County, Texas
Cause No. 148500D; Honorable George Gallagher, Presiding

February 26, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Appellant, Brian James Swinney, appeals his three convictions. Two involved the aggravated sexual assault of M. Y., a child under fourteen years of age and one concerned indecency with a child by contact. On appeal, he asserts that (1) the evidence was insufficient to convict him of the offenses and (2) the trial court abused its discretion

by failing to grant a mistrial after testimony of an alleged extraneous offense. We affirm the trial court's judgments.[1]

Facts

In September 2017, appellant was indicted. Counts one and two alleged that on or about August 1, 2016, he intentionally or knowingly (1) caused his sexual organ to contact the sexual organ of M. Y., a child younger than the age of fourteen and (2) caused his mouth to contact M. Y.'s sexual organ. Count three alleged that on or about the same date, he intentionally, with the intent to arouse or gratify his sexual desire, engaged in sexual contact by touching the genitals of M. Y.

In December of 2017, the State filed its *Notice of Intent to Introduce Evidence of Extraneous Offenses, Other Crimes, Wrongs and Acts* and supplemental *Notice* in August of 2018. In its supplemental *Notice*, the State mentioned two instances wherein appellant engaged in indecent behavior with a child or children by exposure occurring November 29, 2004, and March 29, 2007.

Prior to trial, the court held a hearing on the State's notices and overruled appellant's objections to them. It also granted appellant's request for a limiting instruction during trial and in the jury instructions. The State indicated that only the 2007 incident would be used at trial since there was insufficient notice of the earlier incident in 2004. Both M. M. and M. C. would testify to the incident.

At trial, M. Y. testified that when she was seven to nine years of age, appellant sexually assaulted her six times when he was living at her mother's house. Appellant

[1] Because this appeal was transferred from the Second Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

would find her or arrange for her to be alone with him, take her clothes off, and attempt to enter her private part where she pees. He would ejaculate on her stomach, tell her not to tell anyone, and wipe her stomach with a rag. At times, he would touch her private part with his mouth. These assaults occurred typically in the same manner at different locations—in her mother's house, outside a carwash, and outside a cell phone store.

The final incident occurred at the house where appellant's mother lived in Tarrant County. When they arrived at his mother's house, appellant took M. Y. to his back bedroom, removed his and her clothes, and attempted to enter her private part. He again ejaculated on her stomach and wiped it with the rag. He subsequently placed his mouth on her private part. When she returned home, she told her mother what had happened. Third parties subsequently called the police.

Prior to the testimony of M. M. and M. C., the trial court gave the following instruction to the jury at the request of appellant:

> Ladies and gentlemen, in certain types of cases, the law allows evidence of other alleged offenses, okay, other alleged bad conduct that may or may not have occurred to be admissible in the trial of the case that's on trial in this case. Okay. The testimony that you may hear upcoming may bring into some of that, may go into some of those things. You are instructed that you may consider this for bearing—anything relevant, you may take it into consideration for anything relevant, including the character of the defendant and acts performed in conformity with the character of the defendant and no other purpose. You must find that, before you even consider that, they must have been proved beyond a reasonable doubt. And if it's not proven to you beyond a reasonable doubt, you will disregard it. I will give you the same instructions in the jury instructions at the end in writing, but I wanted you to have that in your mind as this—the next couple of witnesses testify.

Both witnesses testified that they were walking home from elementary school together when they both observed appellant standing on his back porch without any pants or underwear. He was in plain view holding a drink in one hand and masturbating with the other. M. C. testified that appellant whistled at them to get their attention. The two children immediately ran to a nearby business establishment where an employee called the police. During M. M.'s testimony, the following exchanges took place:

> [M. M.]: It's an open fence where you can see everything in the backyard. And we were walking together. And then out of the corner of my eye I seen [appellant], which I knew of [appellant] with a prior incident, but can't talk about that.
>
> [DEFENSE]: Judge, I'm going to object at this time. . . .
>
> * * * * *
>
> [DEFENSE]: I would ask that this witness — I would ask that, one, there was no notice of what she just alluded to. Two, it is not — it doesn't fall under any other bad act or extraneous, there's no notice of it. I ask that this case be declared a mistrial. That statement is unbelievably prejudicial. And I do believe the State did tell her [not to mention the earlier incident], but you can't unring a bell.
>
> [STATE]: You can ask them to disregard and they're presumed to follow your instructions.
>
> [THE COURT]: Your objection is overruled. And I will tell them to disregard the last statement of the witness.

After the trial court's instruction,[2] Homero Carnero, a Corporal for the county sheriff's office, testified to past offenses committed by appellant as follows: (1) in January 2004, appellant committed the offense of indecency with a child by exposure and received

[2] The trial court gave the following instruction to the jury: "Ladies and gentlemen, you are to disregard the last statement of the witness."

community supervision; (2) in February 2007, appellant pled guilty and was convicted of the offense of indecency with a child by contact; and (3) in March 2007, appellant's community supervision was revoked, he was convicted, and sentenced to three years' confinement.

Detective Clint Reed was the detective assigned to M. Y.'s complaint. Among other things, he attended two forensic interviews conducted by Alexis Harrison, an interviewer for the Alliance for Children.[3] Harrison testified that M. Y. made a rolling disclosure. At her first interview, M. Y. was "very hesitant and emotional," and tearful.

After the State rested, appellant presented two witnesses, T. Y. (M. Y.'s mother) and John Kendall, appellant's friend. T. Y. requested a lawyer and indicated she would invoke her fifth amendment right to remain silent. Kendall testified that he and appellant had been friends since high school. He testified that although he was aware of appellant's past and convictions, he was not concerned when his daughter was around appellant because when he was in a real, bad spot, appellant was the only person who went out of his way to make sure they were taken care of.

At the charge conference, the defense again raised the need for a limiting instruction. The trial court included a limiting instruction as follows:

> Evidence of other alleged events not occurring on or about August 1, 2016 have been admitted into evidence. You are instructed that you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such offenses, wrongs, acts, if any were committed, and even then you may only consider the same in determining: (1) the motive, opportunity, intent, knowledge, or identity for this defendant now on trial

[3] M. Y. was also examined by Amy Ornelas, a SANE nurse. During her examination, M. Y. described several forms of sexual contact at appellant's direction, primarily touching. Although the results of M. Y.'s physical examination were normal, her general impression from the entire examination was that M. Y. had suffered sexual abuse.

> before you, or (2) to consider the state of mind of the defendant and the child as well as the previous and subsequent relationship between the defendant and the child, if any, or (3) for the character of the defendant, if any, and any acts performed, if any, in conformity with the character of the defendant and for no other purpose.

Thereafter, the jury found appellant guilty of all three counts.

Issue One—Sufficiency of the Evidence

Appellant asserts the State's evidence at trial was insufficient to support his conviction. This is allegedly so given inconsistencies between M. Y.'s trial testimony and earlier pre-trial statements, Detective Reed's investigation being incomplete, and the absence of physical evidence illustrating M. Y. was assaulted. He also points to Kendall's character testimony.

In assessing the sufficiency of the evidence to support a criminal conviction, this Court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). As to the testimony of witnesses, the trier of fact is the sole judge of the weight of the evidence and credibility of the witnesses. TEX. CODE CRIM. PROC. ANN. art. 38.04 (West 1979); *Dobbs v. State,* 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). We cannot re-evaluate the weight and credibility determinations made by the fact-finder, *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999), and resolve any inconsistencies in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

To prove aggravated sexual assault in counts one and two of the indictment, the State was required to establish that on or about August 1, 2016, (1) appellant intentionally

or knowingly, (2) caused the penetration of M. Y.'s sexual organ and caused M. Y.'s sexual organ to contact or penetrate his mouth by any means, and (3) M. Y. was younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B), (2)(B) (West 2019).[4] To prove indecency with a child in count three, the State was required to establish that on or about August 1, 2016, (1) appellant acted with an intent to arouse or gratify his sexual desire (2) by exposing his genitals knowing M. Y. was present, and (3) M. Y. was younger than seventeen years of age. *See id.* § 21.11(a)(2). One other matter of note is that the uncorroborated testimony of a child victim, standing alone, is sufficient to support a conviction for aggravated sexual assault or indecency, if it encompassed each element of the crime. *Trinidad v. State*, No. 07-19-00034-CR, 2020 Tex. App. LEXIS 5602, at *5 (Tex. App.—Amarillo July 20, 2020, no pet.) (mem. op., not designated for publication); *accord Griffin v. State,* No. 02-19-00020-CR, 2021 Tex. App. LEXIS 328, at *5 (Tex. App.—Fort Worth Jan. 14, 2021, no pet. h.) (mem. op., not designated for publication) (holding that the victim's testimony alone was sufficient evidence to support the jury's verdict).

Comparing the elements of the offenses to the substance of M. Y.'s testimony (as described above), the latter alone is sufficient evidence to support appellant's convictions. There is no requirement that physical, medical, or other evidence be proffered to corroborate the victim's testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07. Thus, we find there is sufficient evidence to support appellant's convictions. Moreover, whether there were inconsistencies between her trial testimony and earlier pre-trial statements, whether investigating detective's investigation allegedly was incomplete, and whether

[4] Appellant does not contest the age of M. Y. So, only the first two elements are at issue here.

appellant's purported character witnesses indicated he would not commit the alleged offenses raises issues of credibility and weight reserved for the fact-finder. The jury was free to believe or disbelieve any portion of the testimony and, as evinced by the verdicts, chose to believe M. Y.'s version of the events testified to at trial. We overrule appellant's first issue.

Second Issue –Mistrial

Appellant next asserts that the trial court abused its discretion by failing to grant a mistrial after M. M. testified that "out of the corner of my eye I seen [appellant], which I knew of [appellant] with a prior incident, but can't talk about that." We overrule the issue.

The denial of a motion for mistrial is reviewed under the standard of abuse of discretion. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). A trial court does not abuse its discretion when its decision is at least within the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004).

An instruction by the trial court to disregard improper statements will usually cure error, unless it appears that the evidence was so inflammatory to suggest it would be impossible to remove the impression from a juror's mind. *Brock v. State*, No. 02-13-00595-CR, 2014 Tex. App. LEXIS 13329, at *2–3 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.) (mem. op., not designated for publication); *Lusk v. State*, 82 S.W.3d 57, 60 (Tex. App.—Amarillo 2002, pet. ref'd). When the trial court instructs a jury to disregard, we presume the jury follows the trial court's instructions. *See id.*

We do not find that the jury could infer that the inadvertent and isolated comment referenced an extraneous crime committed by appellant. Moreover, the single reference to any possible activity between appellant and M. M. was not "so emotionally

inflammatory" that the trial court's instruction to disregard the remark did not cure all error. Also of note is the numerous other extraneous offenses of appellant admitted into evidence. In view of them, it is highly suspect that M. M.'s cryptic comment had any sway with the jury, much less sway that was beyond cure by an instruction to disregard. Thus, the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

The trial court's judgments are affirmed.

Per Curiam

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