In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00250-CR

RICKY SOTO, JR., APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 286th District Court
Cochran County, Texas
Trial Court No. 20-08-1671, Honorable Pat Phelan, Presiding

June 30, 2023

MEMORANDUM OPINION

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

Appellant, Ricky Soto, Jr., appeals from his conviction for aggravated sexual assault of a child. The issues before us involve whether 1) the evidence was insufficient to support his conviction, 2) the trial court erred in denying appellant's motion for mistrial, and 3) the trial court's refusal to declare a mistrial deprived appellant of his due process right to a fair trial. We affirm.

Background

Police were notified of suspected sexual activity between appellant and his thirteen-year-old daughter. The investigation of same then began. Appellant denied any sexual activity, as did his daughter. Upon examination of the girl by the SANE nurse, no trauma to her vaginal region was found. Nevertheless, swabs taken of the child's vulva, that is, swabs taken inside the labia majora, revealed the presence of semen belonging to appellant.

Issue One—Sufficiency of the Evidence

Through his first issue, appellant contends the State failed to prove he penetrated the victim's sexual organ with his sexual organ. This is allegedly so because the only evidence of same was appellant's semen on the outer areas of her sexual organ. We overrule the issue.

The pertinent standard of review is discussed in *Temple v. State*, 390 S.W.3d 341 (Tex. Crim. App. 2013). We apply it here.

Next, the crime involved occurs when one intentionally or knowingly causes the penetration of the sexual organ of a child by any means. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i). Though to be left undefined in a jury charge, "penetration" and "female sexual organ" are given their common meanings. *Green v. State*, 476 S.W.3d 440, 447 (Tex. Crim. App. 2015). To penetrate, in common parlance, means more than mere contact with the outside of an object. *Id.* (quoting *Vernon v. State*, 841 S.W.2d 407 (Tex. Crim. App. 1992)). Pushing aside and beneath a natural fold of skin into an area of the body not usually exposed to view when naked, though, is more than mere external contact and constitutes penetration. *Id.*

Next, the labia majora is part of the female sexual organ. *Green*, 476 S.W.3d at 447 (noting the trial court's definition of the female sexual organ as including the labia majora and deeming the instruction "consistent with this Court's descriptions of the common meaning of the phrase 'penetration of the female sexual organ'"). It likens to the initial natural fold of skin or cutaneous door covering other parts of the female sex organ, such as the labia minora and vagina. Like the inside of a closed door, the inside of that fold would not necessarily be exposed to view. So, touching it is comparable to doing more than contacting the external part of the sex organ. Rather, it indicates the pushing aside and beneath the outside of the fold to gain access to the normally unexposed inside, i.e., penetration.

That semen exits from the urethral meatus (end) of the male sexual organ is common knowledge. And, again, appellant's semen was discovered on the inside of the child's labia majora. Combining the latter with the former (the presence of semen and the manner it exits a penis) is evidence permitting a rational jury to conclude, at the very least, that the end of appellant's penis (sexual organ) contacted the inside of his daughter's labia majora. That the contact may have been slight matters not. *See Keate v. State*, No. 03-10-00077-CR, 2012 Tex. App. LEXIS 2117, at *9 (Tex. App.—Austin March 16, 2021, no pet.) (mem. op., not designated for publication) (observing that the slightest penetration suffices). And, a portion of his penis touching inside the labia majora established penetration of her sex organ. Thus, the evidence was sufficient to illustrate penetration, beyond reasonable doubt.

Issues Two and Three—Denial of Motion for Mistrial and Deprivation of Due Process Rights

Through his second and third issues, appellant complains of the trial court's denial of his motion for mistrial. He moved for same after law enforcement officials brought him inside the courtroom. The jury venire was present awaiting, and he wore shackles at the time. Per the request of defense counsel, the officials removed the shackles. The jury seeing him in shackles allegedly warranted mistrial, while the denial of same allegedly violated his constitutional right to due process. We overrule the issues.

The standard of review is one of abused discretion. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). We apply it here.

Next, a brief, fortuitous viewing by the jury of a defendant wearing handcuffs is not ipso facto prejudicial but rather requires an affirmative showing of prejudice by the defendant. *Jensen v. State*, No. 07-10-00028-CR, 2011 Tex. App. LEXIS 1460, at *10-11 (Tex. App.—Amarillo Feb. 28, 2011, pet. ref'd) (mem. op., not designated for publication); *Garza v. State*, 10 S.W.3d 765, 767 (Tex. App.—Corpus Christi 2000, pet. ref'd). *See Compton v. State*, 666 S.W.3d 685, __, 2023 Tex. Crim. App. LEXIS 233, at *76-77 (Tex. Crim. App. 2023) (noting as "highly questionable" the argument that two jurors briefly seeing the accused in shackles outside the courthouse amounts to an improper influence). No such showing occurred here. Indeed, appellant provides us with no substantive evaluation of prejudice. Rather, he simply assumes that jurors momentarily seeing him so restrained was prejudicial.

This is not a situation where appellant sat restrained for substantial periods of time in the presence of jurors. Apparently, officials were transporting him to the trial. Once he entered the courtroom, his counsel asked that the restraints be removed, and the officials

complied. Nothing appellant cites indicates the actual amount of time appellant wore the shackles within the courtroom and in the presence of the jury. Nor were we cited to evidence illustrating how many members of the venire actually saw appellant restrained or whether those witnessing it were somehow affected by the visage. In short, the circumstance before us compares to that mentioned in *Jensen* and *Garza*; that is, it appears to have been brief and fortuitous. So, appellant had the burden to affirmatively establish prejudice, which he did not. *See Jensen*, 2011 Tex. App. LEXIS 1460, at *11 (noting that prejudice is not presumed and concluding that because members of the venire were not questioned to determine whether any saw appellant being transported while restrained, the burden of establishing prejudice went unmet). Given the record before us, we cannot say the denial of mistrial fell outside the zone of reasonable disagreement and constituted an instance of abused discretion.

Having overruled each of appellant's issues, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice

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