In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00074-CR

DANIEL MOONEYHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 202nd District Court
Bowie County, Texas
Trial Court No. 15F0640-202

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Larry Cummings was surprised to find, on a cellular telephone he was considering buying from Daniel Mooneyham, a short video/audio recording of Mooneyham standing over Mooneyham's ten-year-old niece, Charlie Estell,[1] who was lying on the lower bunk of a set of bunk beds. According to Larry, he saw on the video Mooneyham "grabbing her on the inside of the thigh" and "opening and closing her legs" and heard on the audio her telling Mooneyham that he was heavy. Larry's testimony was allowed over objections by Mooneyham and tended to buttress Estell's live testimony that Mooneyham had indecently touched her on that occasion. As a result of the trial, a Bowie County jury convicted Mooneyham of indecency with a child by contact.[2]

Mooneyham appeals, alleging error by the trial court in admitting Larry's testimony describing the recording he saw and heard on Mooneyham's phone; error in precluding testimony about a possible motive of Estell's parents to entice her to fabricate her allegation; and insufficient evidence that Mooneyham had acted with the intent to arouse or gratify his sexual desire. We affirm the trial court's judgment because (1) there was sufficient evidence of Mooneyham's intent, (2) there was no abuse of discretion in the admission of the testimony recounting the cell phone recording, and (3) there was no abuse of discretion in excluding testimony from the victim's parents.

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[1]We continue the use of this pseudonym employed during the trial court proceedings, but generally will use the shorter "Estell" to refer to the victim.

[2]*See* Act of May 18, 2009, 81st Leg., R.S., ch. 260, § 1, 2009 Tex. Gen. Laws 710 (current version at TEX. PENAL CODE § 21.11 (West Supp. 2017)).

(1) There Was Sufficient Evidence of Mooneyham's Intent

On the evening of October 2, 2014, Mooneyham was visiting Estell's home, where she lived with her parents, Shane and Jamie Cummings. Jamie is Mooneyham's sister. Jamie testified that the house was experiencing power outages due to a storm. Estell testified that, on three occasions that evening, Mooneyham called her to a back bedroom, where the two were alone. She said the first two occasions were invitations from Mooneyham to play games on his cell phones, but she found that neither phone had games on it. She said the third time her uncle grabbed her by the legs and threw her on the bottom bunk of a set of bunk beds. Estell described Mooneyham putting her legs up in the air, his stomach to hers, and touching her "privates," "where he wasn't supposed to" with his fingers, over her clothes. Estell said she fled Mooneyham's presence and went to shower. She said then Mooneyham "came back there and he said, '[I]t'll be funnier with shorts on.'" Later, in an interview with Melanie Holbrook, a Children's Advocacy Center forensic interviewer, Estell indicated on a drawing that Mooneyham touched her around her stomach and her vaginal or genital area. The jury found Mooneyham guilty and assessed a sentence of twenty years' imprisonment.

Mooneyham argues that the record does not present sufficient evidence[3] that any inappropriate touching on his part was done for his personal sexual gratification.[4] He argues that, because the State presented "no testimony regarding the intent to arouse or gratify Daniel Mooneyham's sexual desire," the jury could not "simply assume a critical part of the proof" necessary to meet that part of the State's burden. While it is true there was no direct testimony on Mooneyham's intent, such element may be in inferred by the fact-finder from other evidence.

"Intent may . . . be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004).

Various pieces of evidence support a reasonable inference that Mooneyham engaged in his touching of Estell with the intent to arouse or gratify his sexual desire. She recounted Mooneyham's physical and sexual behavior toward her, as set forth above. She said, and Larry confirmed from the cell phone video, that Mooneyham asked her if she knew what a "cool

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[3]In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.

Mooneyham only challenges the sufficiency of the evidence regarding the criminal element of the alleged contact being done to arouse or gratify Mooneyham's sexual desire.

[4]"'Sexual contact' means . . . any touching of . . . any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *See* TEX. PENAL CODE ANN. § 21.01(2) (West 2011). The indictment alleged Mooneyham engaged in the prohibited contact with Estell "with the intent to arouse or gratify the sexual desire of [Mooneyham]."

massage" was, although this term was never explained. Larry said he heard Estell tell Mooneyham he was heavy. Larry recounted what he saw on the video on Mooneyham's phone, which showed the appellant putting the girl's legs up in the air, "grabbing her on the inside of her thigh," and "opening and closing her legs." She did not report the incident to her mother because, she claimed, Mooneyham threatened to kill her.

Finally, although Mooneyham denied any such video as described by Larry was ever recorded or on his phone, the jury could construe Larry's description and the eventual absence of such a video as evidence of Mooneyham having deleted the video. Mooneyham had possession of the phone, likely more than one day after Larry saw it and before the police acquired it. "Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt." *Guevera*, 152 S.W.3d at 50.

The jury could reasonably have concluded Mooneyham engaged in the prohibited contact with Estell and did so to arouse or gratify his own sexual desire. We overrule this point of error.

(2) There Was No Abuse of Discretion in the Admission of the Testimony Recounting the Cell Phone Recording

Over Mooneyham's objection, the State presented the referenced testimony from Larry, Shane's brother, regarding the recording he witnessed on Mooneyham's cell phone. Larry had known Mooneyham for about twenty years and thought of him as a brother. According to Larry, Mooneyham left Larry alone with the phone a few minutes and Larry toyed with it, trying to see how its various features worked. While doing so, he came across and played the video. On the

recording, Larry said, he recognized the voices of Mooneyham and Estell. He described the video further:

> Well, it showed [Mooneyham] standing up over her, grabbing her on the inside of the thigh. He'd laid on top of her. And I didn't actually see him lay on top of her, I just heard her -- [Defense objection, sustained]. . . . I heard her tell him that he was heavy, so I took it that he'd laid on top of her. . . . . He was just standing up over her, opening and closing her legs, grabbing her on the inside of her thigh. . . . And that's when the video kind of -- I couldn't see them, but I could hear their voices, and that's when she told him that he -- [objection, overruled]. That he was heavy, and I took it that he had laid on top of her.

Larry testified that the video portion of the recording was steady, suggesting that the recording device was stationary. He further testified that some of the activity between Larry and Estell was not captured by the video portion of the recording, though it was captured by the audio portion. Larry said that at some point, he heard Mooneyham ask Estell if she had ever had a "cool massage."

After Larry had seen and heard the recording, Mooneyham came back in the room, and Larry described himself as having a "look" on his face. When Mooneyham asked him what was wrong, Larry said, "[N]othing." Mooneyham took back the phone, saying he wanted to listen to music on the phone.[5]

The State presented testimony from United States Secret Service Agent Paul Patenaude. Patenaude conducted forensic analyses of the cell phone Mooneyham tried to sell Larry and on which Larry said he had seen the video he described. Patenaude testified that he used several testing procedures to examine the phone's contents. He uncovered evidence of as many as 205

[5]The record is not clear, but there is an inference that Larry described the video to Shane and Jamie, and this led to Estell telling them about Mooneyham's actions. Jamie admitted at one point going to her sister's house, where Mooneyham was staying, with a butcher knife to confront Mooneyham.

videos,[6] many of which had been deleted. Of those, many could be retrieved and played, but many could not. None of the videos reviewed matched that described by Larry. Patenaude said this was not unusual for the type of phone at issue and in the field of digital forensics.[7]

Mooneyham testified, denying having engaged in improper contact with Estell. He denied making the video described by Larry. He also denied threatening his young niece and making a statement about shorts to her. On cross-examination of the State's witnesses and during closing argument, Mooneyham questioned whether the video ever existed, focusing on Patenaude's inability to recover evidence of such video from the phone. Mooneyham also denied deleting any suspect video from the phone.

Larry's testimony concerning the alleged recording he claimed to have seen and heard was a central component of the State's case against Mooneyham. Mooneyham contends that the trial court erred in allowing Larry's testimony about the video he saw on Mooneyham's phone, especially in light of the fact that the State's expert in digital forensics could not find evidence on the phone that such a recording ever existed.

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[6]The different testing programs yielded different results. For example, one program showed the presence of 205 video files; another program showed the presence of 186.

[7]Patenaude's written report described four different forensic testing systems he used, some of which were able to access and play deleted videos, and some of which were not. In summary, he wrote:

> As you can see all of the tools processed the same physical extraction image differently[;] some tools recovered more deleted video files than other tools. Some of the tools recovered video files that could be played, while other tools recovered files that could not be played. This is not uncommon in digital forensics. Different tools process the same evidence differently and produce different results. That is one reason we try to use more than one tool if possible. The video in question was not discovered, it could be one of the recovered files that would not play. I[t] could be completely gone, written over, and no longer recoverable.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Abuse of discretion occurs only if the decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). We may not substitute our own decision for that of the trial court.

Mooneyham challenged admission of Larry's testimony on two grounds, emphasizing lack of authentication and adding hearsay. *See* TEX. R. EVID. 801, 901. After reviewing the record and applicable law, we cannot say the trial court's decision to admit the testimony was made "without regard for any guiding rules or principles." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 754 (Tex. 1995). A trial court abuses its discretion when it acts without regard for any guiding rules or principles. *See also Makeig v. State*, 802 S.W.2d 59, 62 (Tex. App.—Amarillo 1990), *aff'd*, 830 S.W.2d 956 (Tex. Crim. App. 1992).

Authentication

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. TEX. R. EVID. 901. The Texas Court of Criminal Appeals addressed a comparable situation in *Wood v. State*, 18 S.W.3d 642 (Tex. Crim. App. 2000). There, the defendant showed his disbelieving brother a surveillance recording of a robbery and murder that Wood and his co-defendant had committed. Wood then instructed his brother to destroy the recording, which the brother did. The brother was then allowed to testify to the recording's contents. The court found

sufficient authentication where the witness brother was familiar with Wood and the co-defendant, he identified those persons, and based on his viewing of the video, he could testify to its contents. Finally, Wood "played the tape for him to prove that they had committed murder during the course of stealing the safe," which helped authenticate its contents. *Id*. at 647. Here, Larry testified that Mooneyham permitted him to inspect the phone prior to sale. This allowed a reasonable inference Mooneyham was the owner of the phone. Larry also testified that he was familiar with the players heard on the video and could identify them. This was sufficient to show that the evidence he presented was what the State maintained, i.e., evidence of a video of Mooneyham engaging in specific conduct with Estell.

Hearsay

"Hearsay" is a statement made by a declarant other than in current testimony in court that "a party offers in evidence to prove the truth of the matter asserted in the statement." TEX. R. EVID. 801(d). Larry's testimony encompassed four matters Mooneyham argues were inadmissible hearsay:

- He saw Mooneyham opening and closing Estell's legs.
- He saw Mooneyham grab Estell's inside thigh.
- He heard Estell say, "[Y]ou're heavy."
- He heard Mooneyham ask Estell if she had ever had a "cool massage."

None of these matters are hearsay. None of these incidents were presented to establish the truth of any matter asserted by the original speaker. The first two did not deal with statements, but described actions Larry witnessed on the phone's video. The last two items were utterances, but were not presented to establish the truth of any matter asserted. A statement not offered to prove the truth of the matter asserted is not hearsay. *Woolverton v. State*, 324 S.W.3d 794, 800 (Tex.

App.—Texarkana 2010, pet. ref'd) (citing *Dinkins v. State*, 894 S.W.2d 330, 347–48 (Tex. Crim. App. 1995)). Because Larry's testimony was not hearsay, the trial court did not err in admitting it over a hearsay objection. This point of error is overruled.

(3) There Was No Abuse of Discretion in Excluding Testimony from the Victim's Parents

Mooneyham also complains that the trial court erred in limiting the evidence he could present regarding a possible motive Estell's mother and stepfather may have had to induce false allegations from the child. Outside the jury's presence, Mooneyham posited that Shane, Estell's stepfather, had, sometime shortly before the child's outcry of improper contact, been physically abusive or assaultive toward Jamie. As a result, according to Mooneyham, Jamie contacted him and asked him to steal Shane's narcotics, as a matter of revenge on Jamie's part. Mooneyham sought to elicit this evidence to demonstrate that Shane did not like Mooneyham and had a motive to get Estell to make fraudulent allegations about indecent contact. We find no error in the trial court's exclusion of this purported evidence.

As cited above, the trial court's rulings on admission or exclusion of evidence are reviewed for an abuse of discretion. A court may exclude evidence it finds irrelevant. *See* TEX. R. EVID. 401; *Henley v. State*, 493 S.W.3d 77, 82 (Tex. Crim. App. 2016); *Webb v. State*, 991 S.W.2d 408, 418 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Mooneyham provided nothing but conclusory arguments to the trial court that his theory of a motive for alleged fabrication had any basis in fact. Mooneyham provided nothing to suggest Estell's allegations were fabricated. The court did allow Mooneyham to elicit testimony, from Estell, that Shane did not like Mooneyham. Mooneyham's attorney also asked Jamie, in the jury's presence, if she had "give[n] something of

value of Shane's to [Mooneyham]," to which Jamie answered, "No." With no suggestion that Estell had made up her allegations, there was no relevance to Mooneyham's theory that Jamie or Shane had a motive to convince the young complainant to make up criminal allegations.

Further, the trial court excluded specific evidence of any abuse or illegal drugs by sustaining the State's objection that such testimony's probative value, if any, would be substantially outweighed by the danger of unfair prejudice or confusion of the issues. *See* TEX. R. EVID. 403.

As discussed above, the trial court did not preclude the defendant from presenting his defense. After Jamie denied having "give[n] anything of Shane's to [Mooneyham]," Mooneyham's attorney then approached the bench to declare her intent to ask Jamie if she knew drugs were in the home. The jury was excused, and the State objected that this line of questioning was not relevant. Mooneyham's attorney explained that her client had told her "Jamie informed him that Shane had physically abused her and asked [Mooneyham] to come over. . . ." When Mooneyham arrived, he claimed Jamie "told him to just take Shane's drugs," which led to Shane being angry at Mooneyham, "and so as retaliation . . . for taking his drugs, this allegation," i.e. Estell's description of Mooneyham's offensive touching, "came about." Mooneyham, though, never sought to make an offer of proof that Jamie would have admitted to being aware of drugs in the house. When he came to the stand, he testified that Shane did not like him because he had taken something of value from Shane, so Mooneyham was not kept from presenting his defense.

As Mooneyham pressed his argument, the State announced an objection "under 403." The State argued that such information was "not relevant as to whether this offense against the child

occurred, and [Jamie] ha[d] already testified that nothing of value was taken from Shane." The trial court concluded that broaching the topic of illegal drugs would be "extremely prejudicial" and would not "answer any question as to any element that ha[d] to be proven before th[e] jury as to whether th[e] indecent act occurred." The trial court sustained the State's objection, finding the topic of illegal drugs was "unfairly prejudicial and could cause the jur[ors] confusion as to what [they were there] for." This directly refutes Mooneyham's appellate claim the trial court's ruling was made without reference to any guiding rule or law, because the court clearly made its decision based on the standard of Rule 403 of the Texas Rules of Evidence. *See* TEX. R. EVID. 403.

Mooneyham next told the court he also wanted to question Jamie about the allegation of abuse she supposedly had made to her brother. Mooneyham's counsel told the court that the defendant and one other, unnamed, witness could testify to the abuse. Counsel repeated her argument that this supposed domestic abuse not only occurred, but then led to Jamie giving Shane's drugs to Mooneyham, inferring that this precipitated what Mooneyham contended were Estell's fabricated claims.

The State lodged the same objection to this line of testimony, and the trial court sustained, stating it did not "want to go into abuse or drugs." From the context of the proceedings, we find that the trial court's ruling here was the same as it was as to the presence of drugs in the home, namely, that the matter's danger of unfair prejudice or confusion of the jury warranted the exclusion of this line of testimony. As for Mooneyham's contention that the trial court failed to weigh the probative value of his fabrication defense against the danger of unfair prejudice, it is not required that the court explicitly, on the record, detail its analysis. *See Santellan v. State*, 939

S.W.2d 155, 173 (Tex. Crim. App. 1997); *Colvin v. State*, 54 S.W.3d 82, 85 (Tex. App.—Texarkana 2001, no pet.). In the absence of a distinct analysis by the trial court on the record, a proper weighing is presumed. *See Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998). We overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: January 5, 2018
Date Decided: February 8, 2018

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