TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00640-CR

Kelly James McCarty, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BURNET COUNTY, 33RD JUDICIAL DISTRICT
NO. 30842, HONORABLE DANIEL H. MILLS, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Kelly James McCarty was indicted for three counts of indecency with a child by contact based on allegations from three children who attended Camp Balcones Springs where McCarty was a counselor. *See* Tex. Penal Code § 21.11. McCarty contended that certain physical touching that became at issue here occurred for medical purposes in the course of him acting as a paramedic/EMT rendering treatment to a camper.

McCarty's first trial resulted in a mistrial. His retrial resulted in convictions on the first and third counts but an acquittal on the second. For his convictions, McCarty received a sentence of five years' imprisonment for the first count and ten years' community supervision for the third count. Only the judgment against McCarty on Count Three—involving the ten-year-old victim identified at trial as "BCB-25"—is at issue here. We will affirm the judgment.

BACKGROUND

The procedural history of this case began in 2009 when McCarty's first appeal was dismissed as untimely. *McCarty v. State*, No. 03-09-00378-CR, 2009 Tex. App. LEXIS 5722, at *1 (Tex. App.—Austin July 22, 2009, no pet.) (mem. op., not designated for publication). McCarty sought habeas corpus relief to file an out-of-time appeal, which the Court of Criminal Appeals granted as to the first count but denied as to the third. *See* Tex. Code Crim. Proc. art. 11.07. This Court subsequently affirmed McCarty's conviction on the first count. *McCarty v. State*, No. 03-11-00628-CR, 2014 Tex. App. LEXIS 4046, at *20-21 (Tex. App.—Austin Apr. 15, 2014, no pet.) (mem. op., not designated for publication). Next, McCarty sought habeas relief to file an out-of-time appeal as to the remaining Count Three, which this Court granted on appeal. *See* Tex. Code Crim. Proc. art. 11.072; *Ex parte McCarty*, No. 03-14-00575-CR, 2015 Tex. App. LEXIS 4346, at *20-21 (Tex. App.—Austin Apr. 29, 2015, no pet.) (mem. op., not designated for publication). McCarty then filed this appeal as to Count Three.

At trial, the jury heard from witnesses including McCarty, camp staff, campers, a certified paramedic, and a psychologist who was also a licensed sex-offender-treatment provider.[1] The founding director of the camp, Marietta Johnson, testified that McCarty worked as a counselor for ten- and eleven-year-old boys. Johnson stated that she stayed at the camp and was considered like a "dorm mother" and the "go to person" for many of the counselors, who were staffed two per cabin with six to eight boys. She testified that the counselors were told about the infirmary at the

[1] Although the jury heard evidence as to three campers' allegations against McCarty, we address only the evidence pertaining to BCB-25.

camp, staffed by registered nurses, who were "available to deal with any sensitive issues" and matters other than "minor issues" such as hurt fingers or little cuts. Johnson testified that she did not recall McCarty mentioning that he was a paramedic when he talked to her about treating the boys. She further testified that McCarty never told her that BCB-25 complained about a problem with his penis and foreskin.

Camp director Kevin McCasland testified that orientation focused on how to be a role model for the boys, and did not include a specific admonition against touching campers' private parts. McCasland stated that first-aid kits were no longer kept in the cabins and that basically anything was to go to the camp's nurses, who were the first point of contact. McCasland testified that McCarty did not tell him that he was a paramedic, although he testified that such information might have been on his camp-counselor application.

Boys' camp director Josh Smithson testified that when McCarty applied to the camp, he asked if he could be an assistant in the nurses' station but that request was declined. Smithson said that he made clear to McCarty that counselors should take campers to the nurse if they needed medical attention. Smithson also said that the camp's manual stated that if there were a medical condition campers should be taken to the nurse, and according to Smithson, "a rash would be considered a medical condition." Smithson stated that he did not verify whether McCarty had EMT certification because it "had no bearing on his application to be a camp counselor." Smithson acknowledged that there were times when one counselor would be left with the campers, such as when the other counselor took a shower.

Camp counselor Justin "Norm" Dickson testified that he was assigned to be McCarty's co-counselor in a cabin with campers, including BCB-25. Dickson testified that counselors were not encouraged to treat things like rashes or minor injuries, noting that they were not nurses. Dickson stated that counselors were trained in CPR and for emergencies and could give a camper a Band-Aid so that they could take care of things for themselves, but "things like that, no, that's what we have nurses for. And in fact I believe there's a line in the handbook that explicitly states that we are not to treat the campers for illnesses, and I know I never did." Dickson recalled that at the beginning of the camp term, when the counselors and campers were getting to know each other, McCarty mentioned that he was an EMT. Dickson testified that BCB-25 never complained to him about anything to do with a painful penis.

BCB-25 also testified at trial, stating that he was ten years old when he attended the summer camp where he first met McCarty. BCB-25 testified that the first time he was alone in a cabin with a counselor was after he was hurt in an outdoor pillow fight and went back to the cabin with McCarty, where another camper BCB-24, joined them a few minutes later. While they were there, BCB-25 stated that McCarty taught them the "Gold Bond trick," in which "we'd put Gold Bond Powder on our penis and then rub water on it, and it would create this stinging." BCB-25 testified that McCarty touched BCB-25's penis "a little bit" on the night of the Gold Bond trick. BCB-25 also testified about another instance when he was alone in the cabin and McCarty came in and touched BCB-25's penis, which was not circumcised. BCB-25 stated that McCarty told him that "I should be used to pulling my penis back because he said girls would be freaked out by an uncircumcised penis." BCB-25 responded that he could not pull it back, and McCarty told BCB-25

"to get a boner so I could—because that would help pull the skin back." BCB-25 denied that any of the other counselors talked to him about sexual things. He also denied complaining to McCarty about any pain or stinging to BCB-25's penis other than the stinging he felt with the Gold Bond trick.

BCB-25 recalled McCarty telling the campers that when they got to junior high they would be in a locker room where people would be getting naked. McCarty told the campers, according to BCB-25, that they had to be comfortable with getting naked. BCB-25 also recalled that McCarty had a computer on which he would play songs and movies, and that he told the campers if they got naked for five or ten minutes they could listen to their favorite song. BCB-25 testified that he did so. BCB-25 also testified that McCarty told the boys that during the last camping term his campers had "naked concerts in their bathroom," where they were "playing guitar with their penis[es]" and "[b]eating their butts like drums." BCB-25 stated that he understood this as a gag to keep them from being uncomfortable about being naked.

The jury also heard testimony from Dr. Matthew Ferrara, a psychologist and licensed sex-offender-treatment provider, who explained the "grooming" process of pedophiles. Dr. Ferrara testified that "grooming amounts to wooing—for the adult wooing a child and making the child receptive to sexual contact with the adult." Dr. Ferrara also testified that grooming is "set up," and that grooming or setting up a victim typically involves setting up a special relationship, trying to isolate the child, and boundary violations. He stated that sexual talk is a way to cross a boundary by introducing sex into the relationship without actually doing it:

> Now, let's pretend for a second that the counselor actually never did naked band or butt bumping. But if he said that, I could see it working where that would be the way he introduced something sexual into that relationship with the kid, to get the kid accustomed to it. . . . That's how they slowly gradually introduce sex. They push the boundaries."

Dr. Ferrara testified a pedophile receives sexual gratification from the grooming process:

> One way to look at grooming and one way to look at pedophilia is it's a courtship disorder. . . . Their grooming is courtship. The thing that they do wrong is they don't pick on someone their own age. They pick a child. . . . But everything an adult might do to woo or groom or date another adult, you know, set up that special relationship, treat the other person really nice, you know, that's what grooming is. . . . If you remember going after your first date, or your first love, and how thrilling and exciting that was. . . . So for the pedophile, the pursuit of a victim is very sexual and very arousing.

After the State rested and McCarty presented his character witnesses, McCarty testified. McCarty acknowledged that he touched BCB-25's genitalia but only for medical purposes. He stated that he overheard BCB-24 and BCB-25 discussing BCB-25's "junk" hurting. McCarty testified that he knew "junk" was a slang term for male genitalia and that he looked over and saw BCB-25 changing out of his swimsuit with his genitals exposed. McCarty remarked that BCB-25 was not circumcised and added, "If you pull back the skin, it looks the exact same, don't worry." McCarty said that BCB-24 told BCB-25 to "pull it back" and BCB-25 said that he could not because it hurt. Then McCarty stated that he asked if he could "check it out . . . to make sure everything [wa]s all right," and asked BCB-25 if "he was all right with me touching it to make sure that everything was all right" and BCB-25 consented. McCarty testified that he used two fingers "and basically went like that on it, picked it up, made sure there was no discharge, swelling, anything that indicates a serious problem, pulled the foreskin back slightly, at which point he said that hurt."

Afterward, McCarty stated that he told BCB-25 it was "not too bad right now" but that if it kept hurting to talk to his doctor about it. McCarty stated that he did not take BCB-25 to the nurse because he did not think it was anything serious and that he did not want to embarrass BCB-25 "by making him go expose himself in front of two women." McCarty stated that he was comfortable examining BCB-25 and that he knew what he was looking for because as part of his EMT training at a hospital in Virginia, he had once seen a doctor perform a genital exam on an uncircumcised boy. McCarty denied showing the campers the Gold Bond trick, denied any campers' games involving nudity, and denied that he touched BCB-25's genitalia for the purposes of sexual gratification.

Finally, the jury heard testimony from Brett Hart, a certified paramedic who was the Compliance and Quality Assurance Manager for the Texas Department of State Health Services. Hart stated that he managed the group that provides EMS provider licensing and investigates complaints against EMS. He explained that there is a national standard curriculum for EMTs and paramedics, which ensures that their training and experience is equivalent among the states. Hart stated that he had over twenty years' experience in the business of emergency medical services, that he had never seen a protocol for EMTs or paramedics to perform genital examinations, and that he had never performed them as an EMT or paramedic. Hart stated that hands-on examinations of genitalia were not performed, and if there were a bleeding injury to male genitalia, patients would be asked to apply pressure themselves, unless they could not. Hart testified that it would not be appropriate based on EMS/paramedic protocols and training for a 21-year-old male camp counselor to examine a 10-year-old camper's penis to determine whether there was an emergency.

DISCUSSION

Consecutive sentences were not an abuse of discretion

In his first issue, McCarty contends the trial court abused its discretion by ordering his sentence in the third count of the indictment to run consecutively with the first count because, in his view, the district court did not order a consecutive sentence in its formal oral pronouncement. *See* Tex. Code Crim. Proc. art. 42.08(a) ("When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction."). "A trial judge's decision to cumulate under Texas Code of Criminal Procedure, Article 42.08(a), is 'a normative, discretionary function that does not turn on discrete findings of fact.'" *Beedy v. State*, 250 S.W.3d 107, 110 (Tex. Crim. App. 2008) (quoting *Barrow v. State*, 207 S.W.3d 377, 380 (Tex. Crim. App. 2006)). When a trial judge lawfully exercises the option to cumulate sentences, that decision is "unassailable on appeal." *Id*.

Here, even if we were to conclude that the district court's formal oral pronouncement of McCarty's sentence was insufficient, McCarty has failed to show harm. *See* Tex. R. App. P. 44.2. The record reflects an open-court discussion about McCarty's sentence—which was to begin with his confinement on the first count followed by his probation on the third count—occurring after a discussion about his possible appeal bond:

> THE COURT: Back on the record. The Court was just reminded that the State has filed a motion to cumulate. [Defense counsel] indicated an opposition to that motion, not surprisingly, and also requests the setting of an appeal bond.
>
> . . . .
>
> THE COURT: I think that—who is his bonding agency?

[Defense counsel]: I don't really know, Your Honor.

THE DEFENDANT: Alamo Bail Bonds.

. . . .

(Break was taken)

. . . .

THE COURT: Here are the judgment[s]. . . . I think I'll add a comment to the probated sentence that it's the Court's intent that the sentence in Count 3—it says consecutive but I don't think it's obvious. . . . I guess it's certainly implied that—

[Prosecutor]: —that when he gets out he goes into probation.

THE COURT: —the confinement starts first, but I'll just jot a note in there that it's the intent that Count 3 [probation] begin when the sentence in Count 1 [incarceration] has ceased to operate.[2]

[Defense counsel]: Let me read these now.

The district court's oral pronouncement of sentence plainly stated that McCarty's sentence would be served consecutively, and the record reflects that the judgment on Count Three containing the cumulation order was provided to defense counsel. Thus, when the sentence was pronounced orally in open court, McCarty was aware from these discussions that the sentence for his offense in Count Three would be served consecutively and after his sentence in Count One "ceased to operate."

McCarty contends that there was no evidence of his presence in the courtroom when the district court stated that it would cumulate the sentences. *See* Tex. Code Crim. Proc. art. 42.03

[2] Consistent with this statement, the judgment on Count Three reflects that McCarty's ten-year confinement in TDCJ is suspended, that he is placed on community supervision for ten years, and contains the district court's handwritten and initialed note that "for clarification—this Count runs consecutively to Count One."

§ 1(a) (requiring defendant's presence during pronouncement of sentence). However, the only evidence in the record is that McCarty was present when the court stated that the sentences would run with "confinement start[ing] first," and McCarty points to nothing in the record affirmatively indicating that he left the courtroom. *Cf. Holly v. State*, 494 S.W.2d 178, 179 (Tex. Crim. App. 1973) (noting that "record affirmatively shows" that sentence was pronounced when defendant was not present). Further, when the court formally addressed McCarty and pronounced his sentence, the court confirmed that McCarty's residence for purposes of his sex-offender registration would be TDCJ until he went on probation, and then remanded him to the sheriff for delivery to TDCJ:

> THE COURT: You will be required to register as a sex offender. We will next week some time get the terms and conditions of the probation drawn up including the Article 62 admonishments. There's one other piece of that I was thinking about.
>
> [Prosecutor]: Of course, Your Honor, we could admonish him on Article 62, and then his place is TDCJ as home. And when he comes out and goes on probation, he'll provide us with his new residence.
>
> THE COURT: That's the way it'll work. . . . We will come back at some point during the week next week, and I'll do both the written and verbal admonishment on Article 62. There was something else about that that was flitting through my mind. In any event, the defendant is hereby remanded to the custody of the sheriff of Burnet County for delivery to the director of Texas Department of Criminal Justice Institutional Division or such other persons as are authorized to receive convicts.

On this record, we cannot conclude that McCarty lacked adequate notice that his sentences for the third and first counts would be cumulated—beginning with confinement in TDCJ followed by probation—or that his substantial rights were violated. We overrule McCarty's first issue.

Sufficient evidence of McCarty's "intent to arouse or gratify his sexual desire"

In his second issue, McCarty contends that there is insufficient evidence supporting the jury's verdict finding him guilty of indecency with a child by contact because there is no evidence that he made such contact "with intent to arouse or gratify his sexual desire." *See* Tex. Penal Code § 21.11; *McCarty*, 2014 Tex. App. LEXIS 4046, at *12 (noting this element of offense of indecent conduct with child). McCarty contends that he was a certified EMT and that he touched BCB-25's penis only to check for discharge, swelling, infection, foreign objects, "if it was unclean," and to ensure it was not "an emergency situation."

We consider the sufficiency of the evidence under the standards set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), considering the evidence in the light most favorable to the verdict and determining whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.; *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We may not substitute our judgment for that of the jury by reevaluating the weight or credibility of the evidence, but must defer to the jury's resolution of conflicts in the evidence, weighing of the testimony, and drawing of reasonable inferences from basic facts to ultimate facts. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We apply the same standard to direct and circumstantial evidence. *Id*. Circumstantial evidence is as probative as direct evidence in establishing the guilt of a defendant, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to appellant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id*.

Rarely will there be direct evidence of a defendant's intent at the time of the incident. *See Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998) ("Mental states are almost always inferred from acts and words."); *Shaw v. State*, No. 03-10-00790-CR, 2012 Tex. App. LEXIS 7539, at *16 (Tex. App.—Austin Aug. 29, 2012, no pet.) (mem. op., not designated for publication); *Scott v. State*, 202 S.W.3d 405, 408 (Tex. App.—Texarkana 2006, pet. ref'd). Usually, the jury must infer intent from circumstantial evidence rather than direct proof. *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991), *overruled on other grounds, Fuller v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992). Thus, in the context of the offense of indecency with a child, the jury may infer the requisite intent to arouse or gratify sexual desire from the defendant's conduct, remarks, and all the surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981); *Yanez-Trejo v. State*, No. 05-14-01362-CR, 2016 Tex. App. LEXIS 4394, at *6 (Tex. App.—Dallas Apr. 27, 2016, no pet.) (mem. op., not designated for publication); *Bazanes v. State*, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref'd); *see also Scott*, 202 S.W.3d at 408 (rejecting defendant's "medical" excuse for touching ten- or eleven-year-old victim's genitals and concluding that there was sufficient evidence from which jury could have inferred that he acted with requisite intent, given victim's age and evidence that she was able to apply rash medication to herself); *Long v. State*, No. 05-05-01634-CR, 2006 Tex. App. LEXIS 9664, at *8-9 (Tex. App.—Dallas Nov. 8, 2006, pet. ref'd) (not designated for publication) (considering all evidence in case and rejecting defendant's claim that he touched victim's genitals only "for medical reasons" because she was complaining of rash and itching).

Here, the jury heard evidence from Dr. Ferrara that the grooming process is "very sexual" and "very arousing" to a pedophile. The jury also heard EMT Hart testify that there was no need to conduct such hands-on genital exams as an EMT or paramedic and that he had never done so in his years of experience. Further, the jury heard Johnson testify that McCarty never mentioned that he was a paramedic when he talked about "treating" any camper. There was also unchallenged evidence that registered nurses were available at the camp infirmary and that McCarty was aware of the nurses but decided against sending BCB-25 to see them. Further evidence that McCarty was aware of the infirmary came from Smithson's testimony that McCarty asked if he could be an assistant in the nurses' station before he started at the camp. Dickson testified that counselors were not encouraged to treat things like rashes or minor injuries, noting that they were not nurses. In his defense, McCarty testified that he had once seen a doctor conduct an examination of a young boy's genitals in a hospital and that McCarty felt comfortable conducting such an examination; however, McCarty never stated that he was authorized to conduct genital examinations alone, without a medical-professional witness. Further, the jury was free to disbelieve McCarty's self-serving claim.

The jury could have found the requisite intent in BCB-25's testimony about the time that McCarty touched BCB-25's genitals after the Gold Bond trick, unrelated to the later exam for his alleged complaint of pain. In considering all the surrounding circumstances, the jury could have considered BCB-25's testimony that he had previously gotten naked for five to ten minutes so that McCarty would play a song on his computer for BCB-25. Further, the jury could have reasonably inferred that, as a ten-year old, BCB-25 would have been able to look at himself privately and answer

questions about whether he saw anything unusual about the appearance of his genitals that might require medical attention and thus, that it was unnecessary for McCarty to touch BCB-25's genitals.

Viewing the evidence in a light most favorable to the verdict, we conclude that the evidence is sufficient to support the jury's conclusion that McCarty touched BCB-25's genitals with the specific intent to arouse and gratify McCarty's sexual desire, and not for a medical reason. *See Scott*, 202 S.W.3d at 408; *see also Brooks*, 323 S.W.3d at 899. Resolving conflicts between McCarty's testimony and other evidence in the record was the responsibility of the jury. *See Isassi*, 330 S.W.3d at 638. We overrule McCarty's second issue.

CONCLUSION

We affirm the district court's judgment of conviction against McCarty as to Count Three for indecency with a child by contact.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: October 6, 2017

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