

**NOS. 12-11-00030-CR
12-11-00031-CR
12-11-00032-CR**

**IN THE COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT
TYLER, TEXAS**

<i>JAMES TOTTEN, APPELLANT</i>	§	<i>APPEALS FROM THE 258TH</i>
<i>V.</i>	§	<i>JUDICIAL DISTRICT COURT</i>
<i>THE STATE OF TEXAS, APPELLEE</i>	§	<i>TRINITY COUNTY, TEXAS</i>

MEMORANDUM OPINION

James Robert Totten appeals his convictions for aggravated sexual assault of a child and indecency with a child by contact. He raises three issues on appeal. We affirm.

BACKGROUND

During the Trinity County January 2010 grand jury term, the grand jury indicted Appellant on the three offenses that are the subject of this appeal.

In the first case (appellate cause number 12-11-00030-CR), the indictment alleged that on February 15, 2010, Appellant intentionally or knowingly caused “the penetration of the sexual organ of Ann Nett (pseudonym)[,] a child who was . . . younger than [six] years of age and not the spouse of [Appellant,] by his finger or penis”

In the second case (appellate cause number 12-11-00031-CR), the indictment alleged that on February 15, 2010, Appellant intentionally or knowingly caused “the penetration of the anus of Ann Nett (pseudonym)[,] a child who was . . . younger than [six] years of age and not the spouse of [Appellant,] by an unknown object”

In the third case (appellate cause number 12-11-00032-CR), the indictment alleged that on February 15, 2010, Appellant, “with the intent to arouse or gratify the sexual desire of [Appellant,] intentionally or knowingly engage[d] in sexual contact with Ann Nett (pseudonym), a child younger than [seventeen] years of age and not the spouse of [Appellant]”

Appellant pleaded not guilty to all three charges. At trial, the jury found Appellant guilty of all three offenses and sentenced him to ninety-nine years of imprisonment for each of the aggravated sexual assault cases, and twenty years of imprisonment for the indecency with a child by contact case. The jury also assessed a fine of \$5,000.00 against Appellant in each case. The trial court ordered that the three sentences run concurrently. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In three issues, Appellant argues that the evidence is insufficient to support his convictions in all three cases. Because these issues are the same, we discuss them together in relation to each case.

Standard of Review

The Texas Court of Criminal Appeals recently held that the *Jackson v. Virginia* legal sufficiency standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. See *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010) (plurality op.).

Under the single sufficiency standard, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct., 2781, 2789, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Under this standard, a reviewing court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. See *Brooks*, 323 S.W.3d at 899; *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Rather, we defer to the trier of fact’s responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct at 2789; *Hooper*, 214 S.W.3d at 13.

Every fact does not need to point directly and independently to the guilt of the appellant, as

long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Hooper*, 214 S.W.3d at 13. Circumstantial evidence is as probative as direct evidence in establishing guilt and may alone be sufficient to establish guilt. *Id.* The standard of review on appeal is the same for both direct and circumstantial evidence cases. *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010).

Applicable Law

As applied in this case, a person commits the offense of aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the anus or sexual organ of a child younger than fourteen years of age by any means. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (2)(B) (West 2011). In addition, the minimum term of imprisonment is enhanced to twenty-five years if it is shown that the child was less than six years of age at the time the offense was committed. *See id.* § 22.021(f)(1). A child victim’s testimony alone is sufficient to support a conviction for aggravated sexual assault of a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 2005); *Martinez v. State*, 178 S.W.3d 806, 814 (Tex. Crim. App. 2005); *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978).

A person commits indecency with a child by contact by engaging in sexual contact with a child younger than seventeen years of age who is not the person’s spouse. TEX. PENAL CODE ANN. § 21.11(a)(1) (West 2011). Sexual contact includes touching the anus, breast, or any part of the genitals of a child, including through clothing, with the intent to arouse or gratify the sexual desire of any person. *Id.* § 21.11(c)(1). The requisite mental state for indecency with a child—intent to arouse or gratify the sexual desire of any person—can be inferred from the defendant’s conduct, remarks, and all surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981); *Bazanes v. State*, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref’d); *see also Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993) (“Intent may be inferred from the actions or conduct of appellant.”); *Rivera-Reyes v. State*, 252 S.W.3d 781, 785 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that circumstantial evidence may be used to prove essential element of indecency with a child). An oral expression of intent is not required—the conduct itself is sufficient to infer intent. *Bazanes*, 310 S.W.3d at 40. Intent can also be inferred from a defendant’s conduct after the incident. *Williams v. State*, 305 S.W.3d 886, 891 (Tex. App.—Fort Worth 2010, no pet.). Just as in sexual assault cases, a child victim’s testimony is sufficient to support a conviction for the offense of indecency with a

child. See TEX. CODE CRIM. PROC. ANN. art. 38.07; *Bazanes*, 310 S.W.3d at 40.

Finally, the child need not necessarily testify in sophisticated terms in order for the evidence to be sufficient to support a conviction. See *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990) (concluding child victim's unsophisticated terminology alone established element of penetration beyond a reasonable doubt); *Satterwhite v. State*, 499 S.W.2d 314, 315 (Tex. Crim. App. 1973) (holding unsophisticated testimony that appellant placed "his male organ into her private parts" was sufficient to sustain conviction).

Discussion

Based on our reading of Appellant's brief, it does not appear that he challenges whether the incidents in question occurred, but instead he argues that there is no evidence connecting him to the offenses. Specifically, Appellant contends as follows:

Here, other than [the child], there were no witnesses to the incidents; [the child] did not tell anyone about the incidents when they happened; and it was only after months of counseling . . . that [the child told her counselor] that it was Appellant who sexually assaulted her. Here there was no physical or biological evidence which connected Appellant to the sexual assault of [the child].

At the outset, we note that physical or biological evidence is not necessarily required to sustain a conviction for the offenses for which an appellant is charged. See *Bargas v. State*, 252 S.W.3d 876, 888 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding evidence legally sufficient even though there was no physical evidence and victim's story was not corroborated by other witnesses) (citing *Garcia*, 563 S.W.2d at 928).

At the trial, the child's mother testified that the child began having burning and irritation in her urinary tract, and was often unable to use the bathroom. She took the child to the doctor, and he could not discover the source of the child's urinary tract problems. Dr. Amol Deshpande, the child's physician, testified that he treated the child for constipation and urinary complaints, specifically "going to the bathroom a lot and hurting to urinate" in July 2008. Neither Dr. Deshpande nor specialists at Texas Children's Hospital could discover any medical causes for the child's urinary complaints. Dr. Deshpande did testify that during one of the examinations, he noticed the child's genital area was red and appeared irritated, which could have caused the urinary tract problems. He also opined that the redness and urinary tract problems could have been caused by sexual intercourse, among other possible causes.

The mother testified that she noticed that the child, a five year old at the time, began to act

strangely in November 2009. Particularly, she observed the child masturbating, and dancing and posing in a sexual manner in front of the mirror while looking at her bottom. She also testified that the child would ride her stick horse toy in such a manner that indicated she was sexually pleasing herself. The child's mother also testified that Appellant was the child's primary caregiver during the day while she was at work, that she and Appellant occupied different bedrooms in the home, and that the child would sometimes sleep in Appellant's room.

Officer John Rayford of the Trinity Police Department testified that in March 2010, he was conducting a fraud investigation against Appellant. Officer Rayford said that Appellant was paying his bills online while using funds from bank accounts that did not belong to him. The officer arrested Appellant and transported him to the City of Trinity holding facility, a small three cell temporary holding facility. Chief Steven Jones of the Trinity Police Department, who is also the administrator for the holding facility, testified that Appellant attempted to commit suicide by hanging himself while detained in the facility.

Texas Ranger Peter Maskunas testified that he was asked to become involved in an investigation of "suspicious activities" related to a child and Appellant. Ranger Maskunas interviewed the child's mother and Appellant. Based on the results of the investigation at that point in time, the ranger scheduled a children's advocacy center forensic interview (CAC interview) with the child and a sexual assault nurse examiner examination (SANE exam).

Meg Brown testified that she is a forensic interviewer at Kaylynn's Center, a child advocacy center (CAC). She conducted a forensic interview of the child, and she stated that the child was talkative when discussing subjects with which she was comfortable. However, when Brown began to talk about sexual abuse, the child

[s]hut down. She ignored [Brown's] questions. She completely avoided them. She curled up in a ball in a chair. And she also became ill-like, and [Brown] had to let her go to the restroom. And her whole disposition changed.

....

[Brown] tried to open the interview back up and allow [the child] to get comfortable again, talking about anything that she was comfortable with, but then anytime [Brown] tried to focus back on the sexual abuse, she would shut down again and repeat the same actions and have to go the restroom.

The child never indicated to Brown who it was that abused her.

Nurse Valerie Murphy, a SANE nurse, testified that she conducted a SANE exam of the

child on March 9, 2010. Nurse Murphy stated that during her examination with the child, the following colloquy took place:

I asked her if anyone had hurt her. She said, "Yes, sometimes they hurt my feelings."

I said, "Yes, sometimes that happens. Has anyone ever touched you someplace they shouldn't?"

She said, "Yeah," and pointed to her vagina, her butt, and her breasts and said, "Here, here and here, my privates."

Then she – then she said, "Can I say what it is?" and points to her vagina.

I said, "Yes, it's okay. You can tell me."

She looked first and said, "My tutu."

I asked, "Who touched you there?"

She said, "I forgot," and looked away.

I said, "It's okay . . . I want you to be safe. I asked if – "Are you afraid or scared?"

She said, "Yes, I'm scared they'll hurt me if I tell, and the ghosts will come back."

I asked, "Where were you when they touched you?"

She said, "I don't remember," looking away and down at the floor.

I asked, "How many times did they touch you?"

She said, "I forget. I don't want to talk about it."

As for the exam itself, Nurse Murphy stated the child started crying as soon as she started the exam, and her crying worsened when the nurse had to "roll her over like in a doggy position to check the anus . . . and she started to cry worse." The nurse testified that the severity of her crying and discomfort was unusual, even though she acknowledged that the exam was uncomfortable in general. Her mother also testified that during the SANE exam, when the nurse began the examination of the anus, the child curled up into the fetal position and began crying and said "No, no, no, it hurts." The nurse testified as to the findings of her report as follows:

[Nurse Murphy:] The labia majora, there was no trauma. The labia minora, there was no trauma. Her hymen was very red, edematous. Unable to visualize tears related to extreme pain. Looked like chopped meat. There was no bleeding. Appears to be healing or in the healing process. And because the hymen was so swollen, I was unable to visualize the vagina. There was a healed tear to the perineum.

And then on the anus, there was a healed tear at the 5:00 o'clock position and discoloration, greenish-blue color from 9:00 to 12:00 on the anus.

[Prosecutor:] What was the significance of these findings?

[Nurse Murphy:] This was consistent with trauma, could be consistent with sexual assault.

[Prosecutor:] And the damage to the rectal area, how did you describe that again?

[Nurse Murphy:] A healed tear at 5:00 o'clock.

[Prosecutor:] Now, could that have been – could that have been caused by trauma to the vaginal area, or would it have been caused by trauma strictly to the rectal area?

....

[Nurse Murphy:] No.

[Prosecutor:] So it would have to have been two different –

[Nurse Murphy:] Yes.

[Prosecutor:] --damaging incidents?

[Nurse Murphy:] Yes.

On cross examination, Nurse Murphy did acknowledge that masturbation could hypothetically have caused the injuries to the child's genitals, provided that it was a penetration type of masturbation, but that it would be very painful for the child. She also acknowledged that a very extreme case of constipation could have caused the tear and discoloration of the anus.

After the CAC interview, SANE exam, and his initial investigation was concluded, the ranger obtained a warrant and interviewed Appellant. Appellant told the ranger that he was unemployed and resided with the child and her mother. Appellant stated that he was the primary caretaker of the child. The ranger testified that once he started asking Appellant questions about the possibility that the child had been sexually assaulted, Appellant became "very angry, aggressive in his movements[, and] started to rise out of his chair when [the ranger] made an accusation that he had sexually assaulted his daughter." Ranger Maskunas also testified that Appellant's "breathing became very hard[, he was moving around a lot[, and he] complete[ly] change[d] from our initial contact where he was very cooperative." Ultimately though, Appellant denied sexually assaulting the child. Ranger Maskunas also testified that he interviewed three other possible suspects, the child's brother, the child's grandfather, and a third person. The ranger testified that all of them were cooperative in the investigation and were

eliminated as suspects. Appellant was ultimately arrested for the charged crimes.

The child's mother testified that approximately four months after Appellant's arrest, on July 24, 2010, the day before the child's birthday, she told the child that she "could protect her if [she] knew who or what to protect her from, and [she] didn't know if the person who hurt her was still around or could still get to her." The mother testified that the child said that Appellant "did it." The mother testified that the child sounded sad and dejected. The mother called Ranger Maskunas, who instructed her to call the child's counselor, Josie Erb.¹ The ranger told the mother not to "press the issue and contact the counselor" so that the counselor could better explore the details of the outcry. Two days after the child made this statement to her mother, the child and her mother saw Erb.

On July 29, 2010, the child indicated to Erb in her thirty-fourth session that it was Appellant who sexually abused her. Specifically, Erb testified as follows:

[Prosecutor:] Did the child ever tell you that she had secrets?

[Counselor Erb:] Yes.

[Prosecutor:] Did you ask her to share those with you?

[Counselor Erb:] Yes, she did.

....

[Prosecutor:] How did it come about that she was ready to discuss this with you?

[Counselor Erb:] She came to the door of the office, and when I opened it, she asked me if she was going to share a secret today because she had been telling me that she would tell me the next session. "Well, maybe the next session." But she kept putting me off each time and not telling me, but at this point she decided – she came on that day and said, "Am I going to tell my secret today?" And I said, "Well, if you're ready?" And she said, "I'm going to tell." So she called her mom to come in with her.

[Prosecutor:] Okay. Did you ask her questions at that point, or did she just tell you?

[Counselor Erb:] I said, "So, you're ready to share your secret today?" And she said, "Yes." And she said, "[Appellant] hurt me in my private spot."

....

And I asked her what that was and she pointed between her legs. And I said, "Okay. What did he hurt you with?" And she said, "My hand." She held up her hand.

¹ On March 16, 2010, the child's mother took the child to Erb for counseling related to the sexual assaults. She had over fifty-three sessions with the child between then and the time of trial.

[Prosecutor:] [D]id you ask her what he hurt [her] with?

[Counselor Erb:] [S]he said, "His hand."

Erb testified that the child told her that the acts occurred at her house in the living room. In a subsequent session, the child disclosed more about the abuse. Specifically, Erb testified as follows:

[Counselor Erb:] I asked her if I could ask her a question about it. And she said, "One question."

I said, "Okay. One question." I said, "When you were talking to me about what [Appellant] did, you said that he hurt you with his hand; is that right?"

And she said, "Well, it could have been a hammer."

And I said, "A hammer?"

She said, "Yes."

I said, "Did you see a hammer?"

And she said, "No."

And I said, "Oh, but it felt like a hammer."

And she said, "Yes."

Finally, Erb testified that the child had a lot of anger and emotional issues, including mood swings and terrible nightmares. She stated that the child's play was very sexualized, including that the child would bury naked dolls in a sand tray and wash them off in a repeated manner, which Erb testified is common in child sexual assault victims. The child also referred to "peeing and pooping a lot," and frequent washing of her hands and arms, which Erb testified are other common signs of sexual assault in child victims. On cross examination, Erb made it clear that the touching was not just touching, but that he put his hand or the object inside her body.

At trial, the child testified by video. She corroborated details of the outcry, specifically that the abuse occurred at her house in the living room, and that Appellant used his hand to hurt her in her "private spot," "where [she] use[s] the bathroom." The child stated that Appellant just used his hand and did not remember seeing anything other than his hand. Appellant testified in his own defense and denied any acts of abuse. He stated that he tickled her like normal adults would, but never engaged in any sexual acts with the child.

The mother testified that since Appellant has been out of the home, the child no longer has problems using the bathroom, and her behavior, through continued counseling, has returned to that of a normal child. Erb also stated that the child has made much progress.

In summary, the State showed that the child was five years old at the time the offenses were committed. Appellant does not challenge that the assaults occurred. The SANE examination showed trauma to the child's genitals and her anus, and that the trauma was consistent with sexual assault. The child testified that Appellant used his hand to penetrate her private spot where she uses the bathroom. As we noted above, the child victim's testimony alone is sufficient to sustain the convictions. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07; *Martinez*, 178 S.W.3d at 814; *Bazanes*, 310 S.W.3d at 40. In addition, the child's statements to Nurse Murphy, Erb, and the child's mother, as well as their own observations, corroborate that Appellant was the person who committed the offenses.

Examining the aforementioned evidence in the light most favorable to the jury's verdict, we conclude that the jury could have reasonably determined beyond a reasonable doubt that Appellant intentionally or knowingly caused the penetration of the child's sexual organ and anus. The jury also could have reasonably concluded that Appellant engaged in sexual contact with the child. Therefore, we hold that the evidence is legally sufficient to support the jury's verdict.

Appellant's first, second, and third issues are overruled.

DISPOSITION

Having overruled Appellant's three issues, we *affirm* the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered September 7, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)