NO. 12-14-00077-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MARQUETTE RASHAUD MOORE, APPELLANT	*§*	***APPEAL FROM THE 114TH***
V.	*§*	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	*§*	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Marquette Rashaud Moore appeals his conviction for aggravated sexual assault of a child. In one issue, Appellant challenges the legal sufficiency of the evidence to support his conviction. We affirm.

BACKGROUND

Appellant was charged by indictment with the offense of aggravated sexual assault of a child, a first degree felony.[1] Appellant pleaded "not guilty," and the case proceeded to a jury trial. At the conclusion of the trial, the jury found Appellant guilty of aggravated sexual assault of a child and assessed Appellant's punishment at ninety-nine years of imprisonment.[2] This appeal followed.

EVIDENTIARY SUFFICIENCY

In his sole issue, Appellant argues that the evidence is legally insufficient to support his conviction. More specifically, he contends that the alleged victim testified that no aggravated

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[1] *See* TEX. PENAL CODE ANN. § 22.021(e) (West Supp. 2015).

[2] *See* TEX. PENAL CODE ANN. § 22.021(f)(1) (West Supp. 2015) ("The minimum term of imprisonment for an offense under this section is increased to twenty-five years if the victim of the offense is younger than six years of age at the time the offense is committed.").

sexual assault occurred, the alleged victim was not credible, the outcry statements were not, by themselves, legally sufficient, and the verdict "rest[ed] on [] speculative conclusions."

Standard of Review

In Texas, the ***Jackson v. Virginia*** standard is the only standard that 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. ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, 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). This standard gives full play to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. ***Padilla v. State***, 326 S.W.3d 195, 200 (Tex. Crim. App. 2010). The jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. ***Brooks***, 323 S.W.3d at 899.

When the record supports conflicting inferences, we presume that the fact finder resolved the conflicts in favor of the prosecution and therefore defer to that determination. ***Clayton v. State***, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Direct and circumstantial evidence are treated equally. ***Id.*** Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). A conclusion of guilt can rest on the combined and cumulative force of all the incriminating circumstances. ***Hernandez v. State***, 190 S.W.3d 856, 864 (Tex. App.—Corpus Christi 2006, no pet.).

Applicable Law

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 by any means if the victim is younger than fourteen years of age. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (2)(B) (West Supp. 2015). The testimony of a child complainant, standing alone and without corroboration, may be sufficient to support a conviction for aggravated sexual assault. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2015); ***Tear v. State***, 74 S.W.3d 555, 560 (Tex. App.—Dallas 2002, pet. ref'd). Furthermore, a child complainant's outcry statement alone can be sufficient to support a conviction for aggravated sexual assault. ***Kimberlin v. State***, 877

S.W.2d 828, 831-32 (Tex. App.—Fort Worth 1994, pet. ref'd) (citing ***Rodriguez v. State***, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991)). A child complainant's outcry testimony retains probative value even if other evidence contradicts it. ***Bargas v. State***, 252 S.W.3d 876, 888 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Further, when a child complainant recants prior testimony, it is up to the trier of fact to determine whether to believe the original statement or the recantation. ***Saldana v. State***, 287 S.W.3d 43, 60 (Tex. App.—Corpus Christi 2008, pet. ref'd) (citing ***Chambers v. State***, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (holding that a complainant's recantation of earlier outcry testimony does not undermine its probative value)). A jury is fully entitled to disbelieve a witness's recantation. ***Id.***

Analysis

At trial, Monica Draughan testified that she and Appellant were the parents of M.M. who was born on November 7, 2009. She also had three older boys. She and Appellant separated in the latter part of 2011, and Appellant began living with his mother, M.M.'s "granny." Monica stated that M.M. began exhibiting inappropriate behavior beginning at the end of 2011 and continuing off and on over the next year. He began sticking his "butt" in the air and wagging it, grabbing his brothers' genitals, sticking his "butt" in his brothers' face, flashing his penis, or grabbing his "butt" and spreading the cheeks of his "butt." Monica talked to M.M. about his behavior. She stated that M.M. always told her that his daddy showed him or taught him that behavior. However, she disregarded his statements because M.M. credited Appellant with teaching or showing him everything, including things that he saw on television. Finally, she said, M.M. stopped asking to go to his granny's house sometime before February 2012.

Monica testified that on March 27, 2013, M.M.'s brothers told her that M.M. was misbehaving. She said further that after she questioned him, M.M. told her that "[m]y daddy be digging in my booty," or sticking his finger in M.M.'s "butt" and wriggling it around. He demonstrated to her what Appellant had done to him using his own finger. Then, M.M. told Monica that he asked Appellant to stop because it hurt and Appellant told him to "hush." Monica asked him if Appellant wiped him too hard instead of sticking his finger in his "butt." M.M. denied that is what happened. Monica took M.M. to the hospital the next day.

Misty Permenter, a registered nurse and a sexual assault nurse examiner (SANE) at Trinity Mother Frances Hospital, examined and interviewed M.M. on March 28, 2013. Monica was not present for the examination or interview. According to Permenter, M.M. told her that

> "Daddy touches me in my butt. He uses this." [M.M.] points to his hand. "Every time he touches my butt, I tell him, "No, daddy. Don't do that." He does that at my granny's house. It hurts."

Permenter examined M.M. and determined that his anus did not exhibit any trauma, bruising, or abnormalities. However, she said, it is common not to find any types of trauma if an examination is more than four days after an incident. Moreover, a person's anus is elastic and can be stretched without trauma.

Law enforcement was notified, a detective was assigned to the case, and Jennifer Kelly conducted a forensic interview of M.M. Kelly testified that she interviewed M.M. alone but that the detective watched the interview from a closed circuit television in the observation room. She said that M.M. discerned the meaning of a truth and a lie with difficulty until she used a second example. M.M. made an outcry to her and was able to demonstrate the abuse. Detective Dianna Brown with the Tyler Police Department testified that she investigated M.M.'s case. She stated that she observed M.M.'s forensic interview and testified that his statements to his mother, the SANE nurse, and the forensic interviewer were consistent. Brown said she interviewed Appellant and that Appellant denied any wrongdoing. Appellant's daughter, sister, and mother also testified. None of them had seen M.M. exhibit any inappropriate behavior.

M.M. testified at trial and was four years old at the time. He stated that when he was at his granny's house, he slept with his father. He knew the difference between "good" and "bad" touches. M.M. testified that Appellant touched his "booboo" or anus with his hand in the bathroom. He said that Appellant rubbed him too hard and hurt him when he helped clean or wipe him. According to M.M., this is what he meant when he said that Appellant hurt him. However, M.M. also stated that Appellant touched him in a way that he did not like, i.e., "bad touching." He said it occurred at his granny's house and that it was different from when Appellant helped clean him. He also testified that the "bad touching" occurred when Appellant was trying to clean him in the bathroom.

The evidence shows that M.M. told his mother and the SANE nurse that Appellant penetrated his anus with his finger. However, Appellant argues in his brief that M.M.'s trial

testimony indicated no aggravated sexual assault occurred and M.M. was not a reliable witness. M.M. appeared to contradict his outcry statements to his mother and the SANE nurse, stating that Appellant hurt him by rubbing him too hard when he was helping M.M. clean himself. But, M.M.'s outcry statements alone can be sufficient to support a conviction for aggravated sexual assault. *See **Kimberlin***, 877 S.W.2d at 831-32. Even if M.M. contradicted his outcry statement at trial, it retained probative value. *See **Bargas***, 252 S.W.3d at 888. Further, it was up to the jury to determine whether to believe M.M.'s outcry statements or the recantation, and they were free to disbelieve his recantation. *See **Saldana***, 287 S.W.3d at 60. Moreover, the jury was the sole judge of M.M.'s credibility and the weight to be given his testimony. *See **Brooks***, 323 S.W.3d at 899.

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational factfinder could have found each element of aggravated sexual assault of a child beyond a reasonable doubt. *See **Brooks***, 323 S.W.3d at 912; ***Tear***, 74 S.W.3d at 560. Therefore, the evidence is legally sufficient to support Appellant's conviction. We overrule Appellant's sole issue on appeal.

DISPOSITION

Having overruled Appellant's sole issue on appeal, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered February 29, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

FEBRUARY 29, 2016

NO. 12-14-00077-CR

MARQUETTE RASHAUD MOORE,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 114-1266-13)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.