App. A

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10/21/2020
PHILLIPS, DONALD

Tr. Ct. No. 1503378

COA No. 01-19-00398-CR
PD-0872-20

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

1ST COURT OF APPEALS CLERK
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NO. 01-19-00398-CR
Court of Appeals For The First District of Texas

Phillips v. State

Decided Sep 10, 2020

NO. 01-19-00398-CR

09-10-2020

DONALD PHILLIPS, Appellant v. THE STATE OF TEXAS, Appellee

Sherry Radack Justice

On Appeal from the 182nd District Court Harris County, Texas
Trial Court Case No. 1503378

MEMORANDUM OPINION

A jury convicted appellant, Donald Phillips, of continuous sexual abuse of a child and sentenced him to 25 years' imprisonment. In two related issues, appellant argues that (1) the evidence is legally insufficient to
2 support his conviction, and (2) the trial court erred in overruling his motion for directed verdict. We affirm. *2

Background

In 2004, when the complainant was seven years old and in the second grade, appellant began dating the complainant's mother. By 2005, when the complainant was in third grade, appellant was responsible for picking up the complainant and her younger brother, I.T., from school on Friday afternoons. Appellant took the complainant and I.T. to his house. There, appellant would take the complainant into his bedroom, have her lay down on his bed, and touch her breasts and vagina with his hand, both over and under her clothing. Specifically, appellant would pull down the complainant's shorts or skirt, place his hand beneath her underwear, and rub the outer lips of her vagina and clitoris for 20-30 minutes. While appellant abused the complainant, I.T. slept or watched television in the living room.

Eventually, the complainant moved with her mother and I.T. into appellant's home. Appellant began coming into the complainant's bedroom at night and rubbing her vagina beneath her underwear to "make [her] feel good." The complainant testified that the abuse, which started around 2005, continued weekly until the appellant was in a motorcycle accident in 2009. The complainant was thirteen when the motorcycle accident occurred.

The abuse stopped while appellant recovered from the motorcycle accident but started again in 2010. Appellant continued to abuse the complainant until January 2013, when Sergio Lozano witnessed appellant touch the
3 complainant *3 inappropriately on her bottom at McCarty's bar, which is owned by a friend of the complainant's family, Maria Vargas. Lozano was Vargas's employee. Lozano saw appellant, with his arm around the complainant, place his hand on the complainant's bottom for over a minute.[1] Lozano asked the complainant why appellant had touched her in that way. The complainant broke down because she had "been holding it in for so long and somebody finally saw." After speaking with Lozano, the complainant decided to

tell her mother about the abuse. She told her mother by telephone the next day that appellant had been touching her for years and that she had thought it would stop after the motorcycle accident, but it did not. Her mother did not believe the abuse had occurred and did not call the police or Child Protective Services ("CPS").

[1] Vargas did not personally observe this contact between appellant and the complainant, but she later reviewed the security footage from that evening in the bar. She testified at trial that appellant is on the video "cupping" the complainant's "behind just like a husband does his wife." The security footage was not introduced at trial because it had been erased.

Because her mother refused to help, the complainant ran away to the home of her friend, Serena Padilla, and told both Serena and Serena's mother, Lisa Padilla, about the abuse. Lisa Padilla called the police. The responding officer, Officer C. Alonzo with the Houston Police Department, contacted CPS. Officer Alonzo also contacted the Houston Fire Department, and the complainant was taken to the hospital where Tiffani Dusong, a
4 certified forensic nurse, conducted a sexual assault examination of the complainant. *4

According to Dusong, the complainant disclosed that appellant had been molesting her since she was nine years old by rubbing her clitoris and touching her breasts. Dusong explained that the clitoris is within the thin inner lips, i.e., the labia minora, of the vagina and that this description would indicate a penetration of the female genitalia. Although she did not find evidence of any traumatic injury, Dusong indicated this was not unusual in a sexual abuse case because genital injuries heal quickly and, due to the stretchy nature of the hymen, even full penetration of the female genitalia rarely causes an injury. Dusong further explained that the lack of physical trauma or injury did not mean that sexual abuse did not occur. She did not discover anything in her examination of the complainant that was inconsistent with the history of abuse the complainant described.

CPS concluded that it was not safe for the complainant to return home. The complainant's mother agreed to let the complainant stay with Vargas. The complainant lived with Vargas for about two years and has not had contact with her mother for almost five years.

Detective G. Garcia with the Houston Police Department investigated the complainant's allegations against appellant. As part of his investigation, Detective Garcia interviewed the complainant and her mother at the
5 Harris County Children's Assessment Center ("Assessment Center"). Detective Garcia noted that the *5 complainant seemed to understand the severity of the situation and allegations being made against appellant.

According to Detective Garcia, in 2010, the complainant was sexually abused by appellant's father Charles Phillips. Given this previous abuse, Detective Garcia confirmed that the allegations against appellant were separate from the previous allegations against appellant's father. The complainant did not have any confusion about the two incidents or who was responsible for the abuse, and she was able to clearly articulate and distinguish the details of the allegations of abuse against both appellant and appellant's father.

Detective Garcia also interviewed appellant. Appellant gave a voluntary statement in which he admitted to having contact with the complainant's breast area, bottom, and knee, but denied that such contact was done for a sexual purpose. Appellant also denied having continuous sexual contact with the complainant. At the conclusion of his investigation, Detective Garcia presented the case to the district attorney, who proceeded with bringing charges against appellant.

In connection with the investigation conducted by CPS and law enforcement, the complainant was also interviewed by Lisa Holcomb, a forensic interviewer at the Assessment Center.[2] Holcomb testified that the
6 complainant gave elaborate and *6 specific details about the alleged abuse by appellant, including the time frame and location of the abuse. Holcomb described the complainant as "very matter of fact,"

"straightforward," and "able to narrate and give . . . specifics throughout the interview." To Holcomb, the complainant did not seem to have any confusion about the identity of the individual who abused her, the timeframe in which the abuse occurred, or the manner of sexual contact.

[2] Holcomb also interviewed the complainant in 2010 about the allegations of sexual abuse against appellant's father. ---

Dr. Lawrence Thompson, Jr., Director of Therapy and Psychological Services at the Assessment Center, testified at trial that it is common for children to be victimized by someone they know and that, in most cases, children do not immediately disclose the abuse or its severity. According to Dr. Thompson, it is not unusual for an abuse victim to both love and hate her abuser. Nor is it unusual for a child to be the victim of multiple abusers, as once she becomes a victim of abuse, she may be at increased risk for future abuse by the same or another perpetrator. A child may not be able to talk about all of the abuse she has suffered or the number of people who have abused her. Children often run away to escape abuse. But Dr. Thompson had not seen any cases where a child fabricated allegations of sexual abuse to split up a family or to get out of household chores or responsibilities.

At the conclusion of the State's evidence, the trial court denied appellant's motion for a directed verdict, and appellant proceeded with the presentation of his defense. Appellant's defense included the theory that the
7 complainant was angry at *7 appellant because of his volatile relationship with the complainant's mother and made false allegations of sexual abuse against him in retaliation. The defense also argued that the complainant's abuse by appellant's father taught her how the judicial process worked.

The defense presented testimony from Detective J.T. Roscoe of the Houston Police Department, who interviewed the complainant in connection with the case against appellant's father. Detective Roscoe explained that, in 2010, he investigated appellant's father after appellant and the complainant's mother found a cell phone containing disturbing images in the complainant's possession. Appellant's father gave the complainant the cell phone. In Detective Roscoe's 2010 interview of the complainant, the complainant did not disclose any abuse by individuals other than appellant's father.

The defense next called I.T., who testified that appellant's father, not appellant, regularly picked him and the complainant up from school on Fridays. On the occasions that appellant picked them up from school, I.T. did not recall appellant and the complainant ever going into appellant's bedroom. But appellant's father would take the complainant into his bedroom and ask I.T. to watch the front door for anyone coming home. I.T. did not think it was possible for appellant to sneak into the complainant's bedroom at night because I.T. would have
8 heard the floorboards creak. I.T. further testified that the complainant had a reputation for being untruthful *8 and that, between 2005 and 2013, the complainant never mentioned that appellant was touching her inappropriately. I.T. did not trust the complainant and blamed her for breaking up the family.

Appellant also testified. He denied that he touched the complainant's private parts from the time she was in the third grade up to the seventh grade. He further denied ever sneaking into the complainant's bedroom at night or touching her private parts. He explained that both he and the complainant's mother would "pat each other" and all of their children "on the booty" as a sign of non-sexual affection.

Appellant stated that he and the complainant had a respectful father-daughter relationship until 2010. After his motorcycle accident in 2009, appellant was in a coma for almost a week. When he returned home, in July 2010, the complainant's mother discovered the cell phone his father had given the complainant. After finding

disturbing sexual images and text messages on the cell phone, appellant called his pastor. Appellant's pastor told appellant to call the police, which appellant did. Appellant cooperated with the police investigation of his father.

When questioned about the incident at McCarty's bar, appellant testified that he did not touch the complainant inappropriately but merely "grazed" her bottom. Appellant testified that he did not mean it in a sexual way and did not derive any sexual gratification from it. According to appellant, the complainant had a history of not
9 being truthful. He believed the complainant made up years of sexual abuse in *9 order to split up his marriage to the complainant's mother. And he testified that the complainant's mother believed him over the complainant.

The last defense witness was the complainant's mother. She stated that the complainant had a history of untruthfulness. Before the incident at McCarty's bar in 2013, the complainant's mother was working with appellant on their marriage, which the complainant disagreed with. According to the complainant's mother, she and appellant got into a fight at the bar and the complainant was angry with appellant about the fight. The complainant's mother did not believe the complainant about the McCarty's bar incident because the complainant had "lied throughout her whole life." The complainant's mother had seen the appellant pat the complainant on the bottom in the house and in public, but the complainant's mother did the same all the time.

The complainant's mother did not believe that appellant ever touched the complainant inappropriately. According to her, the complainant ran away to stay with her friend. When she was notified that the complainant was taken to the hospital for a forensic examination or rape kit, the complainant's mother went to the hospital to see the complainant. But the complainant did not want to come home. Although CPS gave the option for the complainant's mother to bring the complainant home, the complainant's mother agreed to allow the complainant
10 stay with Vargas. *10

As to the abuse perpetrated by appellant's father, the complainant's mother testified that, in June 2010, she found a cell phone that appellant's father had given to the complainant. The cell phone contained disturbing text messages and images of the complainant. Both she and appellant alerted the police and cooperated in the investigation of appellant's father.

Insufficient Evidence and Directed Verdict

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction for continuous sexual abuse of a child. In his second issue, appellant argues that the trial court erred in denying his motion for a directed verdict. Because these two issues constitute challenges to the legal sufficiency of the evidence, we will address them together.

A. Standard of Review

Every criminal conviction must be supported by legally sufficient evidence as to each element of the offense that the State is required to prove beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011). To determine whether this standard has been met, we review all of the evidence in the light most favorable to the verdict, and we decide whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). Sufficiency of the evidence is measured
11 by the *11 elements of the offense as defined by the hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Finally, a challenge on appeal to the denial of a motion for directed verdict is a challenge to the legal sufficiency of the evidence and is reviewed under the same standard. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996).

B. Applicable Law

As set out in section 21.02 of the Texas Penal Code, a person is guilty of the offense of continuous sexual abuse of a child if:

> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
>
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.

TEX. PENAL CODE § 21.02(b).

The State may seek one conviction under section 21.02 for multiple acts of sexual abuse over an extended period of time. *See Price v. State*, 434 S.W.3d 601, 605-06 (Tex. Crim. App. 2014). An "act of sexual abuse" is defined under this statute as an act that violates one or more laws, including aggravated sexual assault. TEX. PENAL CODE § 21.02(c)(4). A person commits the offense of aggravated sexual assault if the person intentionally or knowingly causes contact with or the penetration of the anus or sexual organ of a child under
12 the age of fourteen by any *12 means. *Id.* § 22.021(a)(1)(B)(i). "A person acts intentionally, or with intent, with respect to . . . a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." *Id.* § 6.03(a). "A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b).

The intent of the accused ordinarily is not determined by direct evidence but is inferred from circumstantial evidence. *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978); *Salisbury v. State*, 867 S.W.2d 894, 896-97 (Tex. App.—Houston [14th Dist.] 1993, no pet.). "[I]ntent may be inferred from the acts, words, or conduct of an accused, including the circumstances surrounding the acts in which the accused engages." *Salisbury*, 867 S.W.2d at 897; *see also Mauldin v. State*, 628 S.W.2d 793, 795 (Tex. Crim. App. 1982); *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982).

C. Analysis

Appellant argues that the State failed to prove the element of intent beyond a reasonable doubt and, therefore, the evidence is legally insufficient to support his conviction for continuous sexual abuse of a child and the trial court should have granted his motion for a directed verdict. According to appellant, the evidence is legally insufficient because there was no confession, he denied touching the complainant for a sexual purpose, the
13 complainant had a reputation for being *13 untruthful, there was no medical evidence of injuries, and the complainant had been abused by appellant's father.

Appellant's argument ignores that the uncorroborated testimony of a victim alone is sufficient to support a conviction for continuous sexual abuse of a child. *See* TEX. CODE CRIM. PROC. art. 38.07 (providing that uncorroborated testimony of child victim suffices to support conviction for offense under Penal Code chapter 21, which includes offense of continuous sexual abuse of a child); *Smith v. State*, 340 S.W.3d 41, 49 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("The testimony of a victim, even when the victim is a child, is alone sufficient to support a conviction for sexual assault."); *Gutierrez v. State*, 585 S.W.3d 599, 607 (Tex. App.—Houston [14th Dist.] 2019, no pet.) ("The complainant's testimony, standing alone, is sufficient to support appellant's conviction for continuous sexual abuse of a young child."). Here, the complainant testified as to each element of the offense. The complainant testified that appellant, her stepfather, began abusing her in 2005,

when she was about eight years old, and that the abuse continued until 2013, when she was about sixteen years old. She testified that appellant would rub the outer lips of her vagina, as well as her clitoris, with his fingers for 20-30 minutes at a time. She further testified that this abuse occurred numerous times over the course of years, sometimes on a weekly basis, at appellant's home in Harris County, Texas. Her testimony, standing
14 alone, is sufficient to support appellant's conviction for continuous sexual abuse of a child. *14 TEX. CODE CRIM. PROC. art. 38.07; *Smith*, 340 S.W.3d at 49; *Gutierrez*, 585 S.W.3d at 607.

As to appellant's argument that there was insufficient evidence of intent because he never confessed and, in fact, testified he did not touch the complainant for a sexual purpose, we note that this is not the only type of evidence that may support a finding of intent. As stated above, intent may be inferred from the acts, words, and conduct of the accused. *See Salisbury*, 867 S.W.2d at 897; *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982). Here, the jury was presented with evidence that, on numerous occasions, appellant touched the complainant's vagina, including her clitoris, with his fingers. To do so, appellant pulled down the complainant's shorts or skirt and placed his hand beneath her underwear. The complainant testified that appellant told her he touched her to "make [her] feel good." Furthermore, Dusong, the forensic nurse examiner who performed the sexual assault examination of the complainant, testified that the complainant's description of how appellant touched her clitoris indicated that there was a penetration of the complainant's genitalia. Based on this evidence, the jury could have reasonably inferred that appellant intended to penetrate the complainant's vagina with his fingers.

Regarding the lack of injury or corroborating medical evidence, "[n]either physical nor medical evidence was
15 required to corroborate the child complainant's *15 testimony, which is otherwise sufficient to support a conviction." *Gutierrez*, 585 S.W.3d at 607. Dusong testified that the lack of evidence of a traumatic injury was not unusual in a sexual abuse case. Among the reasons given by Dusong for lack of evidence of an injury were that genital injuries heal quickly; because of the stretchy nature of the hymen, there is rarely an injury even with full penetration of the female genitalia; and if there is a lesser degree of penetration, e.g., only between the outer lips of the vagina, it would be rare to see an injury. Dusong also explained that the lack of physical trauma or injury did not mean that sexual abuse did not occur. She did not find anything in her examination that was inconsistent with the complainant's description of the abuse.

Finally, appellant's arguments that the complainant was a "liar," that her brother contradicted portions of her testimony, and that the evidence shows the complainant was abused by appellant's father, not appellant, rest on evidentiary weight and credibility determinations that are reserved for the jury. *Adames*, 353 S.W.3d at 860 (jury is sole judge of weight and credibility of evidence). may choose to believe none, some, or all of the evidence presented. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). On sufficiency review, this Court must defer to the jury's credibility determinations. *See id.* We do not weigh the credibility of the
16 evidence on appeal. *Morales v. State*, No. 01-17-00377-CR, 2018 WL *16 6693528, at *2 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet.) (mem. op., not designated for publication).

Here, the complainant testified that appellant abused her for many years between the ages of eight and 16. Holcomb and Detective Garcia testified that complainant was able to distinguish the abuse perpetrated by appellant's father from the abuse perpetrated by appellant, and that she did not exhibit any confusion as to the timeframe, contact, and identity of each abuser. Finally, Dr. Thompson testified that it is not unusual for a child to be the victim of multiple abusers, as once she has become a victim of abuse, she may be at increased risk for future abuse by the same or another perpetrator. A rational juror could have found beyond a reasonable doubt that, from the time that the complainant was approximately eight years old until she was sixteen, appellant committed two or more acts of sexual assault against the complainant, despite the evidence of the complainant's

reputation for untruthfulness. We decline appellant's invitation to substitute our own judgment for that of the jury. Viewing the evidence in the light most favorable to the verdict, we hold that there is legally sufficient evidence that appellant committed the offense of continuous sexual abuse of a child.

17 We overrule appellant's first and second issues. *17

Conclusion

We affirm the trial court's judgment.

Sherry Radack

Justice Panel consists of Chief Justice Radack and Justices Goodman and Hightower. Do not publish. TEX. R. APP. P. 47.2(b).
