Affirmed; Majority, Concurring and Dissenting Opinions filed March 23, 2000.

In The

Fourteenth Court of Appeals

NO. 14-96-01362-CR

JERRY CRUICE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 278th District Court
Walker County, Texas
Trial Court Cause No. 18,473-C

M A J O R I T Y O P I N I O N

Appellant, Jerry Cruice, appeals from a conviction for aggravated sexual assault of a child. *See* TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2000). A jury assessed punishment at five years confinement in the Institutional Division of the Texas Department of Criminal Justice. In fourteen issues, appellant contends the trial court erred by (1) admitting his oral statement into evidence; (2) denying his request to determine a witness's competency outside the jury's presence; (3) denying his challenge for cause and request for two additional peremptory challenges; (4) violating his due process rights by failing to disclose exculpatory evidence; (5) denying his motion for instructed verdict; (6) entering

judgment when the evidence was legally and factually insufficient to support the conviction; (7) denying his request for a lesser-included-offense instruction in the jury charge; (8) denying his request for an instruction of involuntary conduct; and (9) overruling his objection to the State's comment on his failure to testify. We affirm.

Complainant, a six-year old girl, told her mother that appellant, the father of her best friend, pulled her shorts down and placed his private parts on her private parts. Complainant's mother took complainant to her pediatrician, who examined her for sexual assault. The examination produced no physical evidence of sexual assault. The incident, nevertheless, was reported to local law enforcement authorities, who interviewed complainant and her family.

After acquiring an arrest warrant, police officers arrested appellant at 3:05 a.m. the following morning for aggravated sexual assault of a child. The investigating officer gave appellant the statutory warnings and appellant said he "wanted some time to think, get his thoughts together." Around 7:40 a.m. the arresting officer returned to appellant's cell and asked appellant if he wanted to give a written statement. Appellant said no and the officer got up to leave the room. As the officer exited, appellant said, "I didn't intentionally set out to hurt that girl. You know, sometimes you do some things without thinking of the consequences and don't realize what you have done until later."

Before trial, appellant filed a motion to suppress the statement. After hearing testimony at a pre-trial hearing, the trial court found the statement to be voluntary, and not the result of custodial interrogation. The court denied the motion.

Suppression of Oral Statement

In his first point of error, appellant contends the trial court committed reversible error in denying his motion to suppress his oral statement. Appellant contends the statement was

inadmissible because it stemmed from custodial interrogation or the functional equivalent thereof.

In a hearing on a motion to suppress evidence, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *See State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). The trial court may thus believe or disbelieve any or all of the witness's testimony. *See Johnson v. State*, 871 S.W.2d 744, 748 (Tex. Crim. App. 1994). As the trier of fact, the trial court may disbelieve testimony even if the testimony is uncontroverted. *See, e.g.*, *Mattias v. State*, 731 S.W.2d 936, 940 (Tex. Crim. App. 1987); *Kirkwood v. State*, 488 S.W.2d 824, 826 (Tex. Crim. App. 1973).

In reviewing the trial court's ruling on a motion to suppress, we afford almost total deference to trial court's determinations of historical facts that the record supports and its rulings on application of law to fact questions, also known as mixed questions of law, when those fact findings and rulings are based on an evaluation of credibility and demeanor. *See Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998). Mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor are reviewed de novo. *See id.*

Article 38.22 of the Texas Code of Criminal Procedure governs the admissibility of oral statements by an accused. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.22 (Vernon 1979 & Supp. 2000). Under section 3(a) of article 38.22, oral confessions are not admissible at trial. *Id.* art. 38.22, §3(a); *Guevara v. State*, 985 S.W.2d 590, 593 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Nevertheless, under section 5 of article 38.22, an unrecorded oral statement is admissible if it is not the product of custodial interrogation. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.22, § 5 (Vernon Supp. 1998); *Wortham v. State*, 704 S.W.2d 586, 589 (Tex. App.—Austin 1986, no pet.). Appellant was clearly in custody when he made the statement to the arresting officer; consequently, the issue presented is whether

the statement resulted from interrogation. Because the issue does not turn on an evaluation of credibility and demeanor, we conduct a de novo review of the trial court's finding that the statement was not the result of custodial interrogation.

Interrogation for Fifth Amendment purposes "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-01; 100 S.Ct. 1682, 1689 64 L.Ed.2d 297 (1980); *Janecka v. State,* 739 S.W.2d 813, 828 (Tex. Crim. App. 1987). "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Innis*, 446 U.S. at 300, 100 S.Ct. at 1689; *Jones v. State,* 795 S.W.2d 171, 176 (Tex. Crim. App. 1990).

The only witness at the suppression hearing was Detective Charles Perkins. Perkins testified that he spoke with appellant in jail soon after his arrest. After Perkins read appellant the statutory warnings, appellant asked "what this is about." Perkins responded that "it was in reference to an incident which had allegedly occurred at his house the previous afternoon with a neighborhood girl." Perkins attested that appellant then said, "I didn't do anything wrong." Perkins responded that "from what we have been told and from what the doctor at the Conroe Medical Center believes, . . I believe you did something – I believe you did do something wrong." Appellant said that "what I did I didn't think was wrong." The men spoke for about ten minutes then appellant said "he wanted some time to think, get his thoughts together." Perkins left.

Perkins testified that the next morning when he returned to the jail, he reminded appellant that appellant was still under the statutory warnings and asked appellant if he would like to give a written statement. Appellant said no so Perkins got up to leave. As he exited appellant said, "I didn't intentionally set out to hurt that girl. You know, sometimes you do some things without thinking of the consequences and don't realize what you have

done until later." Perkins attested that he did nothing to prompt the statement and had never even asked appellant what happened.

Perkins further testified that after appellant volunteered the statement, he asked appellant if he had ever done anything like this to his daughter or anyone else. Appellant said no. After that exchange, Perkins once again started to leave when appellant said, "[I]s there some way I can make a deal with someone to keep this thing from going to court." Perkins told appellant that he would have to talk to the district attorney's office and Perkins left.

Appellant contends that Perkins's question, "do you want to give a written statement," amounted to interrogation. We disagree. The question was an invitation to engage in interrogation, which appellant declined. Although Officer Perkins attempted to initiate interrogation when he asked appellant if he would like to give a written statement, no interrogation took place until after appellant voluntarily offered his thoughts about his intentions with complainant. Even if the question amounted to interrogation, appellant's negative response terminated the interrogation. Perkins asked no other questions of appellant until after appellant made his statement.

Furthermore, Perkins's action in getting up to leave the room after being told that appellant did not want to make a statement did not amount to interrogation. Leaving a room is not an action that Perkins should have known was reasonably likely to elicit an incriminating response from appellant. Accordingly, we overrule appellant's first point of error.

Competency Hearing

In his second point of error, appellant maintains the trial court committed reversible error by denying his request that the court determine the competency of complainant outside the presence of the jury. While the better practice is to hold a competency hearing outside the presence of the jury; *see Schulz v. State*, 957 S.W.2d 52, 65 (Tex. Crim. App. 1997); the

Texas Rules of Evidence do not literally require that a trial court conduct a competency hearing of a child outside the presence of the jury. *See Reyna v. State*, 797 S.W.2d 189, 192 (Tex. App.—Corpus Christi 1990, no pet.). Rule 601(a)(2) requires a trial court to examine a child who is called to testify to determine if the child appears to possess sufficient intellect to relate transactions with respect to which the child is interrogated, but makes no specific provision that the examination be conducted outside the jury's presence. *See* TEX. R. EVID. 601(a)(2). Although Rule 104 authorizes the trial court to make a preliminary determination that a witness is qualified to testify; *see* R. 104(a); it does not require a hearing outside the jury's presence on the qualification of a witness. *See* R. 104(c). On the other hand, rule 104(c) requires the trial court to conduct a hearing outside the jury's presence on the admissibility of a confession in a criminal case and on other preliminary matters "when the interests of justice so require or in a criminal case when an accused is a witness and so requests." R. 104(c).

In this case, appellant requested a hearing outside the jury's presence on a preliminary matter, namely, complainant's competency, but he was not a witness. Therefore, under rule 104(c) the trial court was not required to conduct a hearing outside the jury's presence unless the interests of justice so required one. Appellant contends a competency hearing outside the presence of the jury, in this case, was in the interest of justice because the trial court's comments regarding the competency of the child were a comment on the weight of the evidence and thus, tainted the jury.[1]

Article 38.05 of the code of criminal procedure prohibits a trial judge from discussing or commenting on the weight of the evidence when ruling on its admissibility. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.05 (Vernon 1979). In this case, there is no evidence that the trial judge commented on any evidence in conducting the competency hearing. Instead,

[1] Appellant did not object to the questions or instructions that the trial court gave to complainant at trial. Nevertheless, we will consider appellant's complaint to determine whether the interests of justice so required a hearing outside the jury's presence.

the record reflects the trial court asked complainant some general questions regarding her age and school and then admonished her to tell the truth as follows:

> Let me make sure that you understand that there are going to be some questions asked of you today. You understand that don't you? And you realize that we are going to ask you to answer those questions, okay? And when you make those answers we want to be sure that the are truthful answers. You understand?
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> * * * * *
>
> You know the difference in a truth and a lie? You promise that the jury and you promise me as the Judge and you promise everybody concerned that everything you say today will be the truth?
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> * * * * *
>
> Okay. Well, then, I'm going to ask the District Attorney, Ms. Douglas, then to go ahead and proceed. She will ask you some questions and then when she finishes her questions then Mr. Carter or Mr. Wright over here, they will have some questions for you, okay? All right. I hold she is competent to testify.

Because we find the trial judge did not comment on any evidence in the case, we also find the jury was not tainted by hearing complainant testify as to her competency and the trial judge's instructions to complainant regarding the necessity for truthfulness. Appellant's second point of error is overruled.

Challenge for Cause Prospective Jurors

In his third and fourth points of error, appellant contends the trial court abused its discretion by denying appellant's challenge for cause on two prospective jurors, Lee and Campbell, who said they could not consider probation except under one specific circumstance. In his fifth point of error, appellant contends the trial court erred when it denied his request for two additional peremptory challenges.

A defendant may move to strike a venire member for cause if the venire member has "a bias or prejudice against any of the law applicable to the case upon which the defense is

entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor." TEX. CODE CRIM. PROC. ANN. Art. 35.16(c)(2) (Vernon Supp. 2000). "Bias against the law is refusal to consider or apply the relevant law. It exists when a venireperson's beliefs or opinions 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'" *Sadler v. State*, 977 S.W.2d 140, 142 (Tex. Crim. App. 1998) (quoting *Riley v. State*, 889 S.W.2d 290, 295 (Tex. Crim. App. 1993)).

"[J]urors must be willing to consider the full range of punishment applicable to the offense submitted for their consideration." *Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992). A venireperson's complete inability to consider the full range of punishment, including probation, in a case where the defendant has not been convicted of any prior felony, would render the venireperson unfit for jury service. *See Maddux v. State*, 862 S.W.2d 590, 600 n.2 (Tex. Crim. App. 1993). In assessing a venireperson's capacity to consider the full range of punishment, we will not focus on an isolated answer or passage of venireperson's testimony, but on his or her voir dire testimony as a whole. *See Allridge v. State*, 850 S.W.2d 471, 482 (Tex. Crim. App. 1991).

The record reflects that appellant's trial counsel asked the venire, "Is there anybody on this jury panel who could not consider, in a proper case, five years probation where a child is the victim of the crime?" Lee responded, "As I sit here and think about it, if a person was convicted and found guilty of that type of crime I couldn't consider probation." Appellant's trial counsel inquired if there could be a proper case where he could consider probation to which Lee replied, "Unless there was some type of mental problem that caused it to take place. . . . Sound body and mind I could not consider it." Later, the prosecutor attempted to rehabilitate Lee when she asked, "So then you can envision a case where you could consider giving five years probation if a Defendant were convicted?" Lee replied,

> Only under those circumstances. . . . If the person that was convicted had mental problems and a history of mental problems, not one that just comes up

> and now they are saying he has mental problems. If he has a history of it then I could consider probation with some type of program that he would be working in.

After appellant's trial attorney moved to strike five venirepersons, including Lee and venireperson Campbell, the prosecutor asked if the venirepersons could consider probation where the victim was a female under fourteen who agreed to have sex with a seventeen year old boy because under their culture, they were considered married. Campbell answered that he could consider probation under that situation. Lee did not respond.

Appellant argues that because Lee and Campbell said they could only consider probation in a specific circumstance and no other, they were unable to consider the full range of punishment as applied to the facts of this case and were disqualified to serve under article 35.16. Moreover, he contends, neither Lee nor Campbell indicated they could consider probation under the facts of this case. In support, appellant relies on *Sunday v. State*, 745 S.W.2d 436 (Tex. App.—Beaumont 1988, pet. ref'd). In *Sunday*, a prospective juror said she could not consider probation in a murder case unless it was a mercy killing. *Id.* at 437. The Beaumont Court of Appeals found that the prospective juror was disqualified under article 35.16(c)(2) because she had a bias or prejudice against the law. *See id.* at 438-39. The court held that by restricting probation to one circumstance, the prospective juror "would create her own statutes concerning minimum punishment for the offense of murder." *Id.* The court said that "[w]hile every person is entitled to hold and express such beliefs, we believe a criminal defendant has the statutory right under article 35.16 to have a jury assess punishment after consideration of the full range of punishment for his offense as prescribed by the legislature." *Id.* The court recognized if the case involved a mercy killing, the error in overruling the motion to strike for cause would be harmless; but, the case did not involve a mercy killing. *Id.*

We respectfully disagree with our sister court. Texas courts have held that a juror considers the full range of punishment if the juror is able to conceive of both a situation in which the maximum penalty would be appropriate, and a situation in which the minimum penalty would be appropriate, for a particular offense as charged in the indictment. *See Sadler*, 977 S.W.2d at 142. In this case, both Lee and Campbell conceived of a situation in which probation would be appropriate; thus, they indicated that they could consider probation. Neither Lee nor Campbell were required to indicate a willingness to consider the entire range of punishment for the crime as appellant committed it. *See id.* at 143.

> The law *requires* jurors to use the facts to tailor the punishment to the crime as committed by the guilty defendant. As such it would be nonsensical to rule that a juror who will use the facts to fit the punishment to the crime is unqualified and thus challengeable for cause–such a juror would be doing exactly what the law requires.

Id. at 143 (emphasis in original). The trial court did not abuse its discretion in denying appellant's motion to strike Lee and Campbell for cause.

Moreover, because the trial court did not err in denying appellant's challenge for cause, appellant suffered no harm by using two peremptory strikes on Lee and Campbell. Accordingly, we overrule appellant's third, fourth, and fifth points of error.

Disclosure of Exculpatory Evidence

In his sixth and seventh points of error, appellant claims he was denied due process because the State failed to disclose exculpatory evidence and the trial court erred in denying his motion for mistrial on that ground. Appellant complains the State failed to disclose notes taken by complainant's play therapists, which indicate that complainant accused a "Mr. Jenkins" and her counselor of sexual misconduct,[2] that the district attorney's office was

[2] In Client Notes dated February 28, 1995, therapist Leigh McRae described complainant's play during the session, including imaginary telephone conversations. McRae stated one conversation "was to make (continued...)

upset because complainant's family wanted to take the case to trial,[3] and that complainant never named appellant as the perpetrator during therapy. Appellant concedes he discovered the exculpating evidence during trial; thus, he was afforded the opportunity to use the evidence at trial. Nevertheless, he complains the State's failure to disclose the evidence impaired the preparation of his case, its trial strategy, and voir dire examination.

The State has an affirmative duty to disclose all material, exculpatory evidence to the defense. *See Lagrone v. State,* 942 S.W.2d 602, 615 (Tex. Crim. App.), *cert. denied*, 118 S.Ct. 305 (1997). A prosecutor violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution when he or she fails to disclose material evidence that is favorable to the accused. *See Thomas v. State,* 841 S.W.2d 399, 404 (Tex. Crim. App.1992). "Favorable evidence is any evidence, including exculpatory and impeachment evidence, that, if disclosed and used effectively, *may* make the difference between conviction and acquittal." *Id.* (emphasis in original). Evidence is material if it creates a probability sufficient to undermine the confidence in the outcome of the proceeding. *Id.* A reviewing court determines materiality by examining the alleged error in the context of the entire record and in the context of the overall strength of the State's case. *Id.* at 404-05. The reviewing court may consider any adverse effect the non-disclosure might have had on the preparation or presentation of the defendant's case in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing the course of the defense and the trial in a post-trial proceeding. *Id.* at 405.

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[2] (...continued)
sure the police was at home to take care of her brother and sister and make sure they did not get hurt. In another conversation, McRae noted, complainant "said over the phone that Mr. Jenkins could not hurt her anymore."

On July 18, 1995, McRae recorded in her notes that complainant said she put a spell on McRae and turned McRae into a pumpkin because McRae was bad and mean. When McRae asked complainant what made her bad and mean, complainant said McRae "touched her where I should not have."

[3] On October 2, 1995, therapist Theresa Fusaro noted that complainant's mother told her that "[s]he kept getting the run-around at the courthouse, and someone at the DA's office seemed upset that she wanted to pursue the claim."

In this case, appellant addressed the information in the therapists' notes at trial with therapist Theresa Fusaro. Other than the statement by complainant's mother regarding the district attorney's office, Fusaro did not record the notes at issue. Nevertheless, she testified to the note regarding Mr. Jenkins. Fusaro attested that play therapy involved fantasy play by which a child could work through whatever was troubling her. In explaining "Mr. Jenkins," Fusaro testified that when engaging in fantasy play, children don't always use correct names but use someone else's name or make up a name instead of using the actual name of the person who hurt them. Neither the State nor appellant called the author of the notes, therapist Leigh McRae, to testify. Appellant did not call complainant's mother to testify about her statement regarding the district attorney's office.

Even though appellant complains that he was denied the use of these notes in the preparation of his defense and during voir dire examination, the fact remains that appellant actually used the information in the notes at trial. Therefore, we cannot conclude that there is a reasonable probability that the result of this proceeding would have been different. *See Etherideg v. State*, 903 S.W.2d 1, 20 (Tex. Crim. App.1994). The trial court did not err in denying appellant's motion for mistrial. Appellant's sixth and seventh points of error are overruled.

Sufficiency of Evidence

In his eighth point of error, appellant complains the trial court committed reversible error by denying his motion for an instructed verdict. In his ninth point of error, appellant challenges the legal sufficiency of the evidence to support his conviction. Specifically, appellant contends the evidence does not establish his identity as the perpetrator of the sexual assault beyond a reasonable doubt.

A challenge to the trial judge's ruling on a motion for an instructed verdict is in actuality a challenge to the sufficiency of the evidence to support the conviction. *See Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993). When reviewing legal sufficiency

of the evidence to support a conviction, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Skinner v. State*, 956 S.W.2d 532, 536 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998).

In this case, complainant could not identify appellant as her assailant in court even though she testified that he was the perpetrator of the sexual assault. Even though complainant did not recognize appellant in court, the record clearly reflects that appellant's identity as the perpetrator was not at issue. Instead, the evidence reflects that complainant spent considerable time with appellant and his family and that appellant was the man she claimed to have sexually assaulted her. Complainant testified that appellant committed aggravated sexual assault. Complainant's mother also testified that complainant told her, upon complainant's return from appellant's home, that appellant placed his private parts on her private parts. Complainant's mother also attested that complainant clearly identified appellant's private part as his penis and her private part as her vagina. Complainant's mother further attested that complainant and appellant's daughter were neighborhood best friends and that complainant spent lots of time with appellant and his family, including occasional weekend trips to the lake.

The record also reflects that appellant's appearance had changed at trial from the last time complainant saw him. Complainant attested that appellant lived two doors from her house but she had not seen him since the assault. Complainant attested that appellant had a moustache and blonde hair. She attested that he usually wears a blue shirt and that she had never seen appellant in a suit. She further attested that no one else on her street looks like appellant.

Complainant's mother testified that appellant's in-court appearance was different than his appearance in the past few years. She noted that appellant had lost weight, his hair was

blonder and shorter, he had a moustache, and he was wearing a suit. She attested that she could identify him as her daughter's assailant in spite of his change in appearance because she saw him occasionally on the road where they both resided.

There is also sufficient evidence for a rational trier of fact to conclude that appellant committed the elements of aggravated sexual assault of a child. A person commits aggravated sexual assault of a child if he intentionally or knowingly causes the sexual organ of a child under the age of fourteen to contact his sexual organ. *See* TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2000). The record reflects evidence that while alone in appellant's house, appellant tossed complainant in the air and let her drop to the bed. He then exposed himself to complainant and pulled her panties down. Other evidence indicates that appellant placed his penis on her vagina. Complainant told appellant to stop and he released her. After his arrest, appellant told Officer Perkins that he "did not intentionally set out to hurt the girl but "sometimes you do some things without thinking of the consequences and don't realize what you have done until later." From this evidence, we find a rational trier of fact could conclude appellant was the perpetrator of an aggravated sexual assault upon complainant. Therefore, the trial court did not err in denying appellant's motion for instructed verdict. Accordingly, we overrule appellant's eighth and ninth points of error.

In his tenth point of error, appellant contends the evidence is factually insufficient to support his conviction. In reviewing factual sufficiency, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). We review the evidence weighed by the jury which tends to disprove the existence of the elemental fact in dispute, and compare it to the evidence which tends to disprove that fact. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). We view the evidence in a neutral light, favoring neither party. *See Johnson v. State*, No. 1915-98, slip op. at 10, 2000 WL 140257 at *4, (Tex. Crim. App. Feb. 9, 2000). We may disagree with the jury's

determination, even if probative evidence exists which supports the verdict, but we must be appropriately deferential to the jury's findings to avoid substituting our own judgment for that of the fact finder. *See Santellan*, 939 S.W.2d at 164. Our evaluation should not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony. *Id.* We maintain our deference to the jury's findings by finding fault only when the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust. *Id.* A wrong and unjust verdict is one in which the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Id.* at 164-65.

Appellant contends several facts tend to disprove the elements of aggravated sexual assault, but he does not specify which element of the offense the facts tend to disprove.

Appellant's first three facts concern his identity as the perpetrator. First, appellant contends complainant failed to identify him in court even though she was well acquainted with appellant and his family. Second, complainant's physician testified that complainant did not tell him who the perpetrator was. Third, Teresa Fusaro, complainant's play therapist testified that complainant referred to the perpetrator as Mr. Jenkins on one occasion, and never named appellant as the perpetrator.

The record, however, reflects that complainant consistently named appellant as her perpetrator even though she could not identify him at trial. Complainant's failure to identify appellant at trial was not because she was unfamiliar with appellant. Appellant was complainant's neighbor and the father of her best friend.

The record also reflects that complainant's physician was informed that the perpetrator was complainant's neighbor. Dr. Calvin testified from his transcribed office notes as follows:

> The child basically stated that she was first playing with the gentlemen [sic] in question in which he was lifting her into the air, touching her to the ceiling and then letting her down slowly. She then told me that he pulled down my panties. There is a quote, and then he rubbed his private part against my

> private part. She then told him to stop and he did stop. That was basically the extent of the voluntary information that I could obtain from the child. And then went on to ask her specific questions about the even in more specific nature.

Calvin later testified that the name of the perpetrator did not appear in his typewritten notes but he may have written it down in his own notes. He indicated that the typewritten notes stated that the perpetrator was a neighbor man.

The record also reflects that the perpetrator was identified in the therapist's notes as a neighborhood man. Teresa Fusaro, complainant's play therapist, testified that she reviewed progress notes made by another therapist, who had seen complainant earlier. In one note, someone recorded that the perpetrator was complainant's next door neighbor. In another note, someone recorded complainant's conversation in play in which she stated that "Mr. Jenkins could not hurt her anymore." Fusaro testified that complainant's statement did not mean that someone named Mr. Jenkins had hurt complainant, but the comment was indicative of play. Fusaro explained as follows, in pertinent part:

> A lot of times children suppress themselves what has happened or what is going on in their lives using different names of people. They don't always use correct names. Sometimes it's to protect them from pain so they might use somebody's else name, may be a made up name rather than the actual name of somebody that may have hurt them.

Fusaro also testified that she could not tell from the notes of the other therapist who identified appellant as the perpetrator, but she read the notes to state that complainant told her mother that appellant was the perpetrator and her mother relayed that information to the therapist.

Appellant refers to another set of facts to challenge the credibility of complainant's testimony. Complainant testified that appellant was throwing her up in the air and lowering her to the bed. Appellant asks why would "appellant be playing a game with the victim if

he had the intent to sexually assault her." Appellant also notes that complainant testified that she did not know if the perpetrator's private was hard or soft, and that appellant was able to get his penis out of his shorts because his zipper broken. All of these facts go the weight and credibility of the witness's testimony and not to the proof of the elements of the offense.

Next, appellant contends the testimony of his friend, Bill Cheatham, establishes that there was not sufficient opportunity for him to commit the offense because his children would have been at home at the time complainant alleges the event took place. Cheatham testified as follows: He lives eight to ten miles from appellant. On the day of the alleged assault, appellant helped him with a project at his house. Appellant left his house at approximately 3:15 p.m. to run an errand before his children got home from school. Shortly thereafter, he discovered an ice chest that appellant forgot to take home and he telephoned appellant. Cheatham took the chest to appellant's house at approximately 3:45 p.m. and found appellant alone in the house. He stayed at the house approximately thirty minutes and no one came to the house while he was there. As he left Jonesview Road, the road upon which appellant and complainant live, Cheatham observed a school bus pass him on Route 980 headed toward Jonesview Road. He made it home shortly before his children got off their bus at 4:30 p.m.

The testimonies of complainant's parents, however, place complainant at appellant's house around the time Cheatham left appellant's house. Complainant's father testified that he picked up complainant and her brother from school at 3:55 p.m. on the day of the assault and they arrived at home around 4:05 or 4:07 p.m. He attested that upon their arrival at home, complainant went immediately to appellant's house and he did not see her again until after her mother arrived him from work about 4:45 p.m. Complainant's father further attested that he did not remember seeing a school bus on the way home on that particular day. He testified that several buses go down Route 980, but only one bus goes down Jonesview Road, usually around 4:20 or 4:25 p.m.

Complainant's mother testified that she arrived home from work around 4:45 or 5:00 p.m. Complainant came into the kitchen about five minutes later. She attested that complainant told her she had been to appellant's house and that appellant had sexually assaulted her. She further attested that complainant did not tell her if anyone else was present when the assault took place and she did not ask her or call appellant to confirm the story.

Cheatham's testimony does not provide appellant with a clear-cut alibi, as he alleges. The testimonies of complainant's parents and Cheatham narrow the time frame in which the assault could have taken place. Moreover, there is no evidence that appellant's children were at home at the time of the assault or that appellant and complainant were alone in the house.

Appellant also alleges the evidence is factually insufficient to support the conviction because Fusaro testified that the district attorney's office was upset that complainant's family wanted to push the case. Appellant contends this testimony demonstrates the district attorney's opinion of the strength of the case. Appellant does not explain how this testimony is relevant to the factual sufficiency of the evidence to support his conviction.

Viewing all the evidence, we cannot say that the jury's verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust. Accordingly, we overrule appellant's tenth point of error.

Jury Charge Lesser Included Offense

In his eleventh and twelfth points of error, appellant contends the trial court committed reversible error by failing to include in the jury charge the lesser-included offenses of indecency with a child and misdemeanor assault. A defendant is entitled to a jury charge on a lesser included offense if (1) if the offense is included within the proof necessary to establish the offense charged; and (2) some evidence in the record would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *See*

Arevalo v. State, 970 S.W.2d 547, 548 (Tex. Crim. App. 1998); *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981).

Our first inquiry is whether the offenses of indecency with a child and misdemeanor assault are lesser included offenses of aggravated sexual assault under the facts of this case. An offense is a lesser included offense if (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; or (3) it differs from the offense charge only in the respect that a less culpable mental state suffices to establish its commission. *See* TEX. CODE CRIM. PROC. ANN. Art. 37.09(1), (2), & (3) (Vernon 1981). Whether one offense bears such a relationship to another must be determined on a case-by-case basis because the statute defines lesser-included offense both in terms of the offense charged and in terms of the facts of the case. *See Day v. State*, 532 S.W.2d 302, 315-16 (Tex. Crim. App. 1976) (op. on reh'g).

If either or both offenses are lesser included offenses of aggravated sexual assault under the facts of this case, our second inquiry is whether evidence of the lesser included offense would be sufficient for a jury rationally to find that the defendant is guilty only of that offense, and not the greater offense. *See Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998). "The second prong of the test preserves the integrity of the jury as the fact-finder by ensuring that the jury is instructed as to the lesser offense only when that offense constitutes a valid, rational alternative to the charged offense." *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997). "A lesser included offense may be raised if evidence either affirmatively refutes or negates an element establishing the greater offense." *Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App.1996). "When the evidence raising the lesser-included offense also casts doubt upon the greater offense, it provides the fact finder with a rational alternative by voting for the lesser-included offense." *Forest v. State*,

989 S.W.2d 365, 367 (Tex. Crim. App. 1999). Anything more than a scintilla of evidence from any source is sufficient to entitle a defendant to submission of the issue. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994).

Indecency with a Child

Indecency with a child, under the facts of this case, is a lesser-included offense of aggravated sexual assault. Aggravated sexual assault requires proof that appellant intentionally and knowingly caused the sexual organ of complainant, a child under the age of fourteen, to contact his sexual organ. *See* TEX. PEN. CODE ANN. § 21.021 (Vernon Supp. 2000). Indecency with a child, on the other hand, requires proof that the actor engaged in sexual contact with a child under the age of seventeen who was not his spouse, or exposed his anus or any part of his genitals, knowing the child is present, with intent to arouse or gratify the sexual desire of any person. *See id.* § 21.11(a). Sexual contact is any touching of any part of the genitals of another person with intent to arouse and gratify the sexual desire of any person. *See id.* § 21.01(2); *Guia v. State*, 723 S.W.2d 763, 765 (Tex. App.—Dallas 1986, pet. ref'd). The indecency offense requires the "intent to arouse or gratify the sexual desire" because legitimate, non-criminal, contact may occur between parents, nurses, doctors, or other care-givers and a child, particularly a young child, on the relevant body parts. *See Caballero v. State*, 927 S.W.2d 128, 130-31 (Tex. App.—El Paso 1996, pet. ref'd). The offense, however, does not require that the arousal or gratification actually occur. *Id.* Instead, the offense is complete upon the contact accompanied by the requisite intent. *Id.* Specific intent to arouse or gratify sexual desire can be inferred from the defendant's conduct, his remarks, and all surrounding circumstances. *See Lozano v. State*, 958 S.W.2d 925, 930 (Tex. App.—El Paso 1997, no pet.) (laugh directed at complainant after the commission of the offense); *see also Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998) (penetration of complainant's mouth with appellant's penis sufficient to show specific intent).

The facts of this case establish that the elements of indecency with a child are included within the proof necessary to establish aggravated sexual assault. Complainant testified that appellant engaged in the conduct proscribed in the indecency statute, specifically, that he placed his penis on her vagina and exposed his penis to her. From this conduct, one may infer that appellant had the specific intent to arouse or gratify his sexual desire. Proof admitted of the circumstances surrounding the conduct, specifically, appellant asking complainant to put medicine on his penis and appellant playing a game of toss-up over the bed with complainant, also support an inference of intent to arouse sexual desire. Accordingly, the first inquiry of *Rousseau* has been met. The offense of indecency with a child is a lesser included offense of aggravated sexual assault under the facts of this case.

We now consider whether there is some evidence that would permit a jury rationally to find appellant guilty only of the lesser offense of indecency with a child.

Appellant contends his oral statement to Officer Perkins affirmatively rebuts or negates an element of aggravated sexual assault. Although, appellant does not specify which element of the offense the statement rebuts or negates, we presume from his statement that he means the mental state of intentionally and knowingly causing the sexual assault. Appellant told Perkins, "I didn't intentionally set out to hurt that girl. You know, sometimes you do some things without thinking of the consequences and don't realize what you have done until later."

Appellant's statement to Perkins that he did not intend to hurt complainant does not refute or negate the *mens rea* of intentionally or knowingly causing the complainant's sex organ to come in contact with the actor's sex organ. A person acts intentionally with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct. *See* TEX. PEN. CODE ANN. § 6.03(a) (Vernon 1994). A person acts knowingly with respect to the nature of his conduct when he is aware of the nature of his conduct. *See*

id. § 6.03(b). While appellant may not have intended to hurt complainant, that intent does not refute or negate evidence that he acted with conscious desire and awareness of his action when he placed his penis on complainant's vagina.

Because there is no proof in the record that appellant is guilty only of the lesser offense of indecency with a child, the trial court did not err in refusing to submit the issue to the jury.

Misdemeanor Assault

Like the offense of indecency with a child, the offense of misdemeanor assault is a lesser-included offense of aggravated sexual assault under the facts of this case. A person commits misdemeanor assault if he intentionally or knowingly (1) causes bodily injury to another; (2) threatens another with imminent bodily injury; or (3) causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative. *See* TEX. PEN. CODE ANN. § 22.01 (Vernon Supp. 2000). Without question, the act of intentionally and knowingly causing a child's vagina to contact an adult male's penis is physical contact that the adult male knows or should reasonably believe the child will regard as offensive.

Appellant contends his statement to Perkins that he didn't intend to hurt complainant and evidence that he was playing a game with complainant when the offense occurred is sufficient to permit a jury rationally to find appellant guilty only of the lesser offense of misdemeanor assault. The only evidence of contact, in this case, was defendant's sexual organ touching complainant's sexual organ; such evidence constitutes more than misdemeanor assault. Appellant was not entitled to an instruction on the lesser included offense of misdemeanor assault; therefore, the trial court did not err in refusing to submit the issue to the jury.

Accordingly, we overrule appellant's eleventh and twelfth points of error.

Jury Instruction

In his thirteenth point of error, appellant contends the trial court erred in refusing to instruct the jury on involuntary conduct. Appellant contends evidence that he was playing a game with complainant when the contact occurred and his oral statement to Perkins suggest involuntary conduct or accident.

"A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." TEX. PENAL CODE ANN. § 6.01 (Vernon 1994). "'Voluntariness,' within the meaning of section 6.01(a), refers only to one's physical bodily movements." *Alford v. State,* 866 S.W.2d 619, 624 (Tex. Crim. App. 1993). Only if the "evidence raises the issue of the conduct of the actor not being voluntary, then the jury shall be charged, when requested, on the issue of voluntariness." *Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997).

The record reflects no evidence that appellant's criminal conduct was involuntary. Even though the evidence indicates that he was playing a game with appellant before the contact occurred and that appellant's zipper was broken, there is no evidence that appellant's actions were involuntary. Instead, the evidence reflects that appellant physically placed his penis on complainant's vagina. Because the evidence shows appellant's conduct was voluntary, he was not entitled to an instruction on the issue of voluntariness. Appellant's thirteenth point of error is overruled.

Comment on Failure to Testify

In his fourteenth point of error, appellant contends the trial court erred in overruling his objection to the State's comment on his failure to testify during closing argument at the close of the punishment hearing. Appellant claims the prosecutor commented on his failure to testify when he said, "They talk about having to go to counseling. How many times have

you heard that counseling only works if you accept it, if you accept responsibility. That's what probation--"

A comment on the defendant's failure to testify violates the privilege against self-incrimination in the Fifth Amendment to the United States Constitution, Article I, Section 10 of the Texas Constitution, and Article 38.08 of the Texas Code of Criminal Procedure. *See* U.S. CONST. Amend. V; TEX. CONST. Art. I, § 10; TEX. CODE CRIM. PROC. ANN. Art. 38.08 (Vernon 1979); *Saldivar v. State*, 980 S.W.2d 475, 501 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). To determine whether a prosecutor's argument constitutes an allusion to or comment upon the failure of a defendant to testify, we review the language from the standpoint of the jury. *See Goff v. State*, 931 S.W.2d 537, 548 (Tex. Crim. App. 1996). We consider whether the offending language was manifestly intended or of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify. *Montoya v. State*, 744 S.W.2d 15, 35 (Tex. Crim. App. 1987), *overruled on other grounds by Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). It is not enough that the language might be construed as an indirect or implied allusion to a defendant's failure to testify; the implication that the offending language made reference to the failure to testify must be a necessary one. *See Swallow v. State*, 829 S.W.2d 223, 225 (Tex. Crim. App. 1992). A statement is not a direct comment on a defendant's failure to testify when it does not refer to evidence that can come only from the defendant. *See Goff*, 931 S.W.2d at 548.

In support of its contention that the statement was a comment on his failure to testify, appellant relies on opinions from two intermediate appellate courts, *Oliva v. State*, 942 S.W.2d 727, 733-34 (Tex. App.—Houston [14th Dist.] 1997), *pet. dism'd, improvidently granted*, 991 S.W.2d 803 (Tex. Crim. App. 1998) (per curiam) and *Cacy v. State*, 901 S.W.2d 691, 703 (Tex. App.—El Paso 1995, pet. ref'd). The prosecutor in *Oliva* comment on appellant's lack of remorse and there was no evidence to support the comment in the

record. *See Oliva*, 942 S.W.2d at 734. In *Cacy*, the prosecutor said in closing argument of the punishment hearing that "I've always heard that the first step to rehabilitation is for the person who needs it . . . to come forward and ask for it." *Cacy*, 901 S.W.2d at 703. The State argued that the comment "could have referred to other witnesses, who themselves may have noted Appellant's need for rehabilitation." *Id.* The *Cacy* court disagreed and noted that appellant was the only person who might be expected to ask for rehabilitation. *Id.* The *Cacy* court found the witnesses' failures to opine that appellant needed rehabilitation to be irrelevant to an assessment of punishment for appellant's crime, i.e., murder. *Id.*

The present case is distinguishable from *Oliva* and *Cacy*. Unlike the prosecutor in *Oliva* and *Cacy*, the prosecutor, in this case, was summarizing evidence presented during the punishment phase of trial when she made the complained-of remark.[4] A summation of evidence presented at trial is one of the four permissible areas of a proper jury argument. *See McFarland v. State*, 989 S.W.2d 749, 751 (Tex. Crim. App. 1999). Unlike *Oliva*, the complained-of comment, in this case, did not refer to appellant's lack of remorse, but to appellant's ability to benefit from rehabilitative counseling. Unlike *Cacy*, the opinion of friends and relatives regarding appellant's ability to benefit from rehabilitative counseling, in this case, was relevant to the assessment of punishment for his crime. "The desire, potential, and ability of a person to rehabilitate himself can be objectively assessed and testimony on this subject does not have to come from the defendant alone." *Davis v. State*, 670 S.W.2d 255, 256-57 (Tex. Crim. App. 1984).

The record here reflects that the only witness here who discussed counseling during the punishment phase of trial was David Baker, the Director of the Adult Probation

[4] The prosecutor reviewed the terms and conditions of probation and testimony that was presented in relation to those terms and conditions. After making the complained-of statement, the prosecutor reviewed what she had discussed with jurors on voir dire about the purposes of sentences, including the need for punishment, deterrence, and rehabilitation. She asked whether probation would deter appellant or rehabilitate him.

Department of Walker, Grimes, and Madison Counties. Baker testified generally about the terms and conditions of probation imposed on those convicted of a sexual assault offense and specifically about court-ordered counseling.[5] Although Baker had never met appellant, he did not recommend probation for appellant because of the nature of his crime.

Appellant's wife, his best friend, Bill Cheatham, Cheatham's wife, and appellant's next door neighbor testified on appellant's behalf, but none of them opined that appellant would benefit from counseling or could be rehabilitated. Appellant's wife testified that appellant should be given probation because he was a family man. Cheatham testified without elaboration that he believed appellant could fulfill the terms and conditions of probation. Cheatham's wife testified that appellant would be suitable for probation. Appellant's next door neighbor testified that she would not be concerned if appellant was placed on probation. Cheatham's wife and appellant's next door neighbor were unaware of appellant's remark that he did not set out to hurt complainant but "sometimes you do things without thinking about the consequences of what you have done until later." None of these witnesses testified whether appellant could or would accept responsibility for his action.

Accordingly, we find the record supports the State's contention that in making the statement that "counseling only works if you accept it, if you accept responsibility," the prosecutor was merely pointing out that probation and counseling would be ineffective in appellant's case. Counseling goes to the question of rehabilitation and appellant produced no evidence of his potential and ability to benefit from counseling, especially in light of his statement regarding his intent not to hurt complainant. The complained-of statement was not a direct comment on appellant's failure to testify and, if an indirect or implied allusion to his failure to testify, it was not a necessary implication considering the whole of the State's

[5] Baker testified that if the court orders the offender to attend psychological counseling, his office makes the referral to a counseling agency and monitors the offender's progress and attendance. Once the counselor advises his office that no further counseling is required, his office would document the notification and advise everybody. Baker further testified that a weekly counseling program was available through Texas A & M University to local offenders placed on probation.

argument. Therefore, the trial court did not err in overruling appellant's objection to the statement. Appellant's fourteenth point of error is overruled.

Accordingly, we affirm the judgment of the court below.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed March 23, 2000.

Panel consists of Justices Amidei, Edelman and Wittig.

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