Affirmed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01073-CR

DAVID PHILLIP HINKLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 790,307

O P I N I O N

After a jury trial, appellant, David Phillip Hinkle, was convicted of aggravated sexual assault of a child and sentenced to life imprisonment. On appeal, appellant challenges the legal and factual sufficiency of the evidence, the jurisdiction of the trial court, and the admission of hearsay testimony. We affirm.

BACKGROUND

The complainant in this case is appellant's daughter. Appellant was living with the complainant's mother, Stephanie Hinkle, and the complainant when allegations of sexual abuse came to light. Appellant's

sister, Tracy Martin, and Martin's family were also living in appellant's home.

One day, while at the park, the complainant told Tina Martin, Tracy Martin's daughter, that appellant had sexually abused her. That afternoon, Tracy, Tina, and Stephanie talked to the complainant about the abuse. To show what happened, the complainant undressed two Barbie and Ken dolls. The complainant placed the private part of the Ken doll to the Barbie doll and moved the Ken doll up and down on the Barbie doll. To indicate where she had been touched, the complainant pointed to her breasts and to her genital area.

The complainant was seven years old when she testified at trial and, according to her psychologist, Glen Kercher Ph.D., had an intelligence level that was borderline intellectual functioning. The complainant testified that appellant put his private part "in my hole."

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In conducting a legal sufficiency review of the evidence, an appellate court must view the evidence in the light most favorable to the verdict and determine if any rational fact finder could have found the crime's essential elements to have been proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The reviewing court will examine the entire body of evidence; if any evidence establishes guilt beyond a reasonable doubt, and the fact finder believes that evidence, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency. *See id.*

In reviewing the evidence for factual sufficiency, an appellate court will examine all the evidence without the prism of "in the light most favorable to the prosecution," and will set aside the jury's verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The appellate court is authorized to disagree with the jury's determination, even if probative evidence exists that supports the verdict. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). However, a factual sufficiency review must be appropriately deferential so as to avoid substituting our own judgment for that of the fact finder. *See id.* Accordingly, we are only authorized to set aside a jury's finding in instances where it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *See id.*

The jury is the sole judge of the facts, the witnesses' credibility, and the weight to be given the evidence. *See Clewis*, 922 S.W.2d at 129; *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Accordingly, the jury may choose to believe or disbelieve any portion of the witnesses' testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). If the record contains conflicting testimony, conflict reconciliation is within the jury's exclusive province. *See Heiselbetz v. State*, 906 S.W.2d 500, 504 (Tex. Crim. App. 1995). Contradictions or conflicts between the witnesses' testimony do not destroy the sufficiency of the evidence; rather, they relate to the weight of the evidence, and the credibility the jury assigns to the witnesses. *See Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd).

In his first two points of error, appellant complains that the evidence was legally and factually insufficient to support his conviction. Appellant contends the complainant's testimony fails to prove that he placed his sexual organ on, in, or against her sexual organ.

Appellant was charged with the offense of aggravated sexual assault. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (a)(2)(B) (Vernon 1994 & Supp. 2000). The State alleged in the indictment, and had the burden to prove, that appellant intentionally and knowingly caused the contact and penetration of the female sexual organ of the complainant, a person younger than fourteen years of age and not the spouse of appellant, by placing his sexual organ in, on, or against the female sexual organ of the complainant.

Penetration of the female sexual organ may be proved circumstantially. *See Villalon v. State*, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990). The victim need not testify as to penetration. *See id*. However, a sexual assault victim's testimony alone is sufficient evidence of penetration. *See Cagle v. State*, 976 S.W.2d 879, 880 (Tex. App.—Tyler 1998, no pet.) (citing *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. [Panel Op.] 1978)). This is true even if the victim is a child using unsophisticated language to describe the act. *See Jones v. State*, 817 S.W.2d 854, 856 (Tex. App.—Houston [1st Dist.] 1991, no pet.).

The complainant testified that appellant put his private part in her "hole." Appellant argues there

is nothing in the record to suggest that by "hole" the complainant meant her sexual organ. Appellant points to the complainant's failure to use the term "private part" as evidence that she must have been referring to something other than her female sexual organ when she used the word "hole."

Appellant bases his argument on a portion of the complainant's testimony where she pointed to the area between her legs and stated that she calls this part of her body "private part." She further stated that "private part" is the only name she uses when referring to this area of her body. However, in determining the sufficiency of the evidence, an appellate court is to view the record as a whole. *See Satterwhite v. State,* 858 S.W.2d 412, 415 (Tex. Crim. App. 1993). A review of the entire record belies appellant's contention that the evidence is insufficient.

Tina Martin testified that the complainant pointed to her breasts and genital area when describing where appellant had touched her. The complainant also indicated through the use of dolls that appellant placed his sexual organ in or on her sexual organ. Diana Medea, a sexual assault examining nurse, testified that the hymen of a six-year old girl is usually smooth. However, Medea found there was a significant interruption or disruption of the border of the complainant's hymen and such disruption would necessarily be caused by something penetrating the sexual organ. Dr. Kercher testified the complainant told him "that [appellant] put his dingy in my hole" and that the complainant uses the word "hole" when referring to her female sexual organ. Dr. Kercher also testified that during their discussions about the sexual abuse, the complainant alluded to vaginal intercourse.

Standing alone, it is conceivable that the complainant's testimony that appellant put his private part in her "hole" could have referred to something other than her female sexual organ; however, when taken together with the testimony of Tina Martin, Diana Medea, and Dr. Kercher, it is clear that she was referring to her female sexual organ. Under these facts, the evidence is both legally and factually sufficient for a rational trier of fact to conclude beyond a reasonable doubt that appellant placed his sexual organ on, in, or against the complainant's sexual organ as alleged in the indictment. We, therefore, overrule appellant's first and second points of error.

JURISDICTION OF TRIAL COURT

In his third point of error, appellant complains the evidence was insufficient to support his conviction because the State failed to prove that the conduct took place within the territorial jurisdiction of the State of Texas. Texas Penal Code section 1.04 provides:

> (a) This State has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which he is criminally responsible if:
>
> (1) either the conduct or a result that is an element of the offense occurs inside this State[.]

Jurisdiction may be proved by circumstantial evidence. *See Vaughn v. State*, 607 S.W.2d 914, 920 (Tex. Crim. App. 1980). Further, jurisdictional facts need not be established by evidence beyond a reasonable doubt; rather, proof by a preponderance of the evidence will sustain a finding of jurisdiction. *See Gonzales v. State*, 784 S.W.2d 140, 142 (Tex. App.—Austin 1990, no pet.).

Appellant claims that testimony adduced at trial indicated that the acts complained of occurred in Pennsylvania. The record, however, does not support appellant's contention. Appellant alleges the record indicates the complainant lived in Pennsylvania. To support this claim, appellant cites us to his trial testimony that he went to Pennsylvania to visit his sister for three weeks. Nothing in this testimony remotely leads to the conclusion that the complainant ever lived in or visited Pennsylvania, as appellant claims.

Appellant further cites us to another portion of the record in which he claims his sister, Tracy Martin, testified that the complainant had previously accused appellant of having committed the alleged acts while *they* were living in Pennsylvania. Appellant would have us believe that "*they*" refers to himself and the complainant. However, a reading of the record indicates that Tracy Martin actually lived in Pennsylvania at the time and said, "[w]e'd already been told by [appellant] before this, up in Pennsylvania, that [the complainant] tried to make accusations about him." Again, nothing in this testimony leads to the conclusion that the complainant ever lived in or visited Pennsylvania. Tracy Martin testified that she had always lived in Pennsylvania and that appellant had come to visit her. She made no mention of the complainant accompanying appellant during the visit, nor is there any indication in the record that the offense occurred in Pennsylvania.

The record indicates that the complainant lived with her mother in Huntsville, Texas at the time of trial. Prior to that time, the complainant lived with her mother and appellant at a home in Houston. The complainant testified that the abuse occurred "in [her] mom's bedroom." Stephanie Hinkle, the complainant's mother, testified that the house was located in Harris County, Texas. Thus, the circumstantial evidence shows that appellant's sexual abuse of the complainant took place in Houston, Harris County, Texas. Appellant's third point of error is overruled.

HEARSAY TESTIMONY

In his fourth point of error, appellant asserts the trial court erred in admitting, over objection, hearsay statements of the complainant through the testimony of Glen Kercher, Ph.D.

Dr. Kercher, a psychologist who had been in private practice for thirteen years at the time of trial, is a member of the Texas Psychological Association and the American Psychological Association, and has published two articles concerning child sexual abuse. He has counseled between fifteen hundred and two-thousand child victims of sexual abuse. Prior to trial, Dr. Kercher evaluated the complainant in thirteen separate therapy sessions and determined she showed characteristics of a child who had been sexually abused. During his direct testimony, the State asked Dr. Kercher if the complainant had told him details of the allegations of sexual abuse. Dr. Kercher answered that she had. When the State asked Dr. Kercher what types of details the complainant had told him, appellant objected that the question called for a hearsay answer. After the trial court overruled appellant's objection, Dr. Kercher answered, "She has alluded to vaginal intercourse. She also talked about masturbating, the defendant. She also talked about one incident of oral sex."

Appellant claims the above testimony was inadmissible hearsay. Texas Rule of Evidence 803(4), however, provides that statements made for the purpose of medical diagnosis or treatment are not excluded by the hearsay rule, even though the declarant is available as a witness. A child's statements to a mental health therapist describing the abusive acts and identifying the abuser are reasonably pertinent to medical diagnosis and treatment and are properly admitted pursuant to Rule 803(4). *See Zinger v. State*, 899 S.W.2d 423, 431 (Tex. App.—Austin 1995), *rev'd on other grounds*, 932 S.W.2d 511 (Tex. Crim.

App. 1996).

Appellant claims Dr. Kercher's testimony does not fall under the exception of Rule 803(4) because Dr. Kercher is not a physician and because the State failed to establish the proper predicate for admission. Rule 803(4) requires that the statements sought to be admitted be made for the purpose of medical diagnosis or treatment. This exception to the hearsay rule is based on the assumption that the patient will provide accurate information to a physician in order to receive effective treatment. *See id.* The State met this requirement by showing that the complainant was being counseled by Dr. Kercher because she raised an allegation of sexual abuse. Further, if the statement is made to another for the purpose of medical treatment, the person to whom the statement is made does not necessarily have to be a "medical person." *Gohring v. State*, 967 S.W.2d 459, 461 (Tex. Crim. App. 1998). The trial court did not err in admitting the testimony over appellant's hearsay objection. Appellant's fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed April 27, 2000.
Panel consists of Justices Yates, Fowler and Frost.
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