Affirmed and Opinion filed August 17, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00654-CR

———————————

LARRY GRANGER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 769,941

O P I N I O N

A jury convicted Larry Granger of sexual assault of a child and sentenced him to ten years in prison and a $10,000 fine. Both the sentence and the fine were probated. In two points of error appellant contends the evidence was legally and factually insufficient to support the jury's verdict. We affirm.

THE EVIDENCE

Granger was charged with assaulting K. A., his mentally handicapped stepdaughter, who was fifteen at the time of the offense. His argument is that her testimony is so contradictory and inconsistent that it is legally and factually insufficient to sustain his conviction. We will therefore detail the relevant evidence.

Charlotte Hudson, K. A.'s special education teacher, testified at trial that K. A. functioned academically at a 3- to 5-year-old's level and was unable to read or compose sentences. She could perform routine housekeeping tasks at a somewhat higher level, and could remember things that happened. Hudson said K. A. was unable to articulate at a level that most people could understand, although she could often gesture to get her message across. She said K. A. could not understand complex questions, and that sometimes a person would have to ask a question in several different ways to get a good consistent answer from her. Hudson also said K. A. could remember events, and that she was a very conscientious child "very happy to do the right thing."

Harris County Deputy Shannon Bowdoin first interviewed K. A. at the hospital. Because of the severity of her mental handicap, Bowdoin said he had to relay questions through K. A.'s mother. Bowdoin said he decided that K. A. was consistent in the event she related, and that an offense had occurred.

Detective Robert Merchant, with the department's child abuse sexual assault division, also reviewed the case. He said he first viewed a tape in which a specially trained Child Protective Service worker interviewed K. A. using anatomically correct dolls, then interviewed Brenda Granger, K. A.'s mother. He said that based on these interviews, he determined that an offense had occurred. Merchant later summoned appellant to the police station for an interview. He said appellant appeared to be nervous during the short interview and said little before asking for an attorney.

Dr. Joan Shook said laboratory tests from K. A.'s visit to the emergency room at Texas Children's Hospital showed no semen and no obvious trauma to the genital area. A cotton swab

used in the examination suggested the presence of sperm but was not positive. Tests on the sheets found on the bed in the "little house" also were negative for fluids or hairs. Shook also said that in a case where a victim had sexually matured, it would be "extremely uncommon" to find definitive proof of sexual organ contact.

Medical records introduced at trial show that K. A.'s mother told the examining physician that her stepfather had pulled her pants down, then his pants, and got on top of her. According to these records, K. A. confirmed this account to the doctor via "yes" or "no" answers and also stated that her stepfather told her not to tell anyone.

Brenda Granger was married to appellant at the time of the incident. She lived in a trailer home with him, their infant son and K. A.; on the same plot of land was another trailer home and a one-room building with a bed in it, known as the "little house." On the day in question, appellant had returned from a shift at his job as a truck driver. She said her husband was moody that day and so the two were not speaking. Later, in the afternoon, she fell asleep while tending to the couple's three-month-old son. When she awoke, it was growing dark, so she started looking around to make sure her daughter was inside. After a few minutes, she saw her husband and daughter emerge from the vicinity of the "little house," near where she last saw her husband raking leaves. She said they were talking and started holding hands, walking up and down the street and visiting neighbors. Granger said this was unusual because, when she and her husband were not speaking, her husband usually ignored K. A.

Later, after appellant left the house, Granger said she went to her daughter's room and questioned her about what had been going on in the "little house." She said K. A. became defensive and anxious, which troubled her so much that she had to leave the room to regain her composure. She went in the "little room" and saw that there was pocket change on the bed, where there had been none earlier in the day. Granger returned to her daughter's room and resumed her questioning. She said K. A. indicated that appellant touched her between her legs. After other questioning, Granger said she examined her daughter's genital area. She noticed first that K. A.'s panties were on wrong – both legs were through one leg hole – and that there

was some kind of discharge in several places on the panties. At that point, Granger took K. A. to the emergency room.

K. A. testified that appellant took her to the bed in the "little house," pulled down her panties, pulled down his pants and got on top of her. She said his "skin" touched her and pointed to the penis of an anatomically correct doll, and said the touching hurt. She said appellant stayed on top of her a long time, then he put her underwear back on and told her "don't say anything" to anyone else.

K. A.'s testimony was hesitant, sometimes contradictory, and in general much like a pre-schooler's. She identified the male and female sexual organs as "private parts." At one point she said appellant did not touch her and did not get on top of her. She also said that she had told the jury what really happened, then said it was not real, then said it was real.

Appellant took the stand and said he had been sitting outside the trailer that afternoon, drinking beer and talking with friends about cars. He said K. A. had been out there with him most of the afternoon, and that when she grabbed for his keys at one point she touched his penis. After his friends went inside, appellant said he went into the "little house" with K. A. to find a radio. While there, appellant said, K. A. grabbed his penis and started rubbing it. He said he grabbed K. A. by the hand and took her out of the house and walked her down the street. He said he told her that she shouldn't be touching men in their private parts, and that when he threatened to tell her mother what she had done, K. A. got very upset. Appellant also said he stayed home that night, and while he saw his wife and K. A. and their son leave the house late that night, he didn't ask where they were going.

Appellant said he was not told about the allegations until mid-February, and that K. A. continued to live in the house until then. He also said his son, who had lived in the "little house" until a short time before the incident, had a key to the "little house" and might have gone in there without his knowledge. He also said he thought K. A. could be deceptive.

Robert Spurlock testified he was one of the men talking with appellant that afternoon. He said that K. A. was clinging to appellant and acting affectionate, and that appellant was not cross with her.

SUFFICIENCY

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See Jackson v. Virginia*, 443 U.S. 307, 315-16(1979). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 320; *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). The evidence is examined in the light most favorable to the jury's verdict. *Jackson*, 443 U.S. at 320; *Johnson*, 871 S.W.2d at 186. All of the evidence is considered by the reviewing court, regardless of whether it was properly admitted. *Johnson*, 871 S.W.2d at 186; *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991); *Thomas v. State*, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988). A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *Tibbs v. Florida*, 457 U.S. 31, 41-42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

The sufficiency of the evidence is measured against the offense defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App.1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restricts the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." *Id*.

The jury is the trier of fact, and is the ultimate authority on the credibility of witnesses and the weight to be given to their testimony. See TEX. CODE CRIM. PROC. ANN. Art. 38.04 (Vernon 1979); *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [panel op.] 1981). It is for the jury as trier of fact resolve any conflicts and inconsistencies in the evidence. *Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982). Even where there

is no conflict, the jury may give no weight to some evidence, and thereby reject part or all of a witness's testimony. See *Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987); see also *Chambers*, 805 S.W.2d at 461 (holding jury as judge of credibility may "believe all, some, or none of the testimony"). Because it is the province of the jury to determine the facts, any inconsistencies in the testimony should be resolved in favor of the jury's verdict in a legal sufficiency review. *Johnson v. State*, 815 S.W.2d 707, 712 (Tex. Crim. App. 1991) (quoting *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988)).

Appellant argues K. A.'s testimony is so contradictory that it adds up to no evidence. We disagree. First, we note that appellant did not challenge K. A.'s competency to testify. Once competent evidence is presented, it is the responsibility of the trier of fact to determine the credibility of the witness and the weight to be given her testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Norman v. State*, 862 S.W.2d 621, 628 (Tex. App.—Tyler 1993, pet. ref'd); TEX. CODE CRIM. PROC. ANN. art. 38.04. When viewed in the light most favorable to the verdict, we find the evidence legally sufficient to sustain the conviction. We overrule appellant's first point of error.

Appellant's second point of error challenges the factual sufficiency of the evidence to sustain the jury's verdict. *See Johnson v. State*, No. 1915-98, 2000 WL 140257 (Tex. Crim. App. February 9, 2000); *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996). In conducting factual sufficiency review, the court reviews all the evidence in a neutral light, favoring neither party. *Johnson*, 2000 WL 140257, at *5. The verdict will be set aside, and the cause remanded for a new trial, if contrary to the overwhelming weight of the evidence and therefore clearly wrong and unjust. *Clewis*, 922 S.W.2d at 129. While the evidence is viewed without the prism of the light most favorable to the verdict, a reviewing court must be deferential to the fact finder, i.e., careful not to invade the province of the jury to assess the credibility and weight of the evidence. *Id*. at 133, 135; *De Los Santos v. State*, 918 S.W.2d 565, 569 (Tex. App.--San Antonio 1996, no pet.). The appellate court must defer to jury findings, and may find the evidence factually insufficient only when necessary to prevent manifest injustice. *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).

Appellant argues that if the evidence is not viewed in the light most favorable to the verdict, it cannot sustain his conviction. We disagree. This jury had not only K. A.'s admittedly inconsistent testimony, but her mother's testimony as well. Medical records admitted for the purposes of treatment reflected that a sexual assault had occurred. Finally, the absence of physical evidence does not preclude the occurrence of a sexual assault, as appellant contends. Dr. Shook testified that definitive evidence of sexual contact would seldom be found in a case involving a sexually mature victim. We therefore do not find that this verdict is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We overrule appellant's second point of error and affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed August 17, 2000.
Panel consists of Justices Sears, Cannon, and Draughn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.