Affirmed and Opinion filed September 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01177-CR

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KENNETH MARK BRAGGS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 763,340

O P I N I O N

Kenneth Mark Braggs appeals his conviction by a jury for aggravated sexual assault of a child under fourteen years of age. The trial court assessed his punishment at fifteen years imprisonment. In three points of error, appellant contends: (1) the evidence is legally and factually insufficient to support his conviction; (2) he received ineffective assistance of counsel; and (3) the trial court erred in admitting hearsay testimony concerning appellant's extraneous acts of sexual abuse to the child victim. We affirm.

The child victim, D.H., testified that appellant started sexually abusing her when she was 11 years old. He would come into her room at night and touch her breasts, touch her vagina, kiss her, and put his penis into her vagina. Appellant was indicted for the sexual assault of D.H., a child under fourteen years

of age, that occurred on or about July 1, 1996, by placing his penis in her sexual organ. D.H. testified that she was thirteen years old and living with her grandparents at the time of this assault in 1996. She stated she was braiding her two-year-old sister's hair when appellant came in the room. D.H.'s sister left the room, and appellant pulled D.H.'s pants down and inserted his penis into her vagina. D.H. and her sister were alone in the house when appellant assaulted her. D.H. said she told her mother, godmother, and sister about appellant's sexual attacks but no one did anything about it. While D.H. was visiting her aunt in January 1997, she told her aunt about appellant's sexual assaults. D. H.'s aunt called Child Protection Service (CPS) which conducted the investigation.

Dr. Robin Williams, a pediatrician, examined D.H. on May 8, 1997, several months after appellant sexually assaulted her in 1996. Dr. Williams determined the D.H.'s hymenal opening had been stretched by "blunt force trauma." Dr. Williams stated the D.H. had "likely been a victim of sexual abuse." However, Dr. Williams said she based her opinion on her physical examination of D.H. and D.H.'s history of reported sexual abuse by appellant. She stated that there is no physical evidence of sexual abuse in 60 percent of these cases. If D.H. had given her a false history, Dr. Williams stated her opinion of D.H.'s sexual abuse would not be correct.

In point one, appellant asserts the evidence is legally and factually insufficient to sustain his conviction. Essentially, appellant argues that there was no physical evidence to support the jury's finding that he placed his penis in her vagina, and D.H.'s testimony lacked credibility due to inconsistencies in her testimony and her propensities for lying.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App.1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App. 1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex.Crim.App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245

(Tex.Crim.App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex.Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex.Crim.App.1982).

The sufficiency of the evidence to support a conviction should no longer be measured by the jury charge actually given but rather measured by the elements of the offense as defined by a hypothetically correct charge. *See Curry v. State*, 975 S.W.2d 629, 630 (Tex.Crim.App.1998). "Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability and adequately describes the particular offense for which the defendant was tried." *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App.1992).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id*. In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id*. In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. The appropriate remedy on reversal is a remand for a new trial. *Id*.

A factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164

(Tex.Crim.App.1997). This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id*. The appellate court maintains this deference to the fact 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*.

The court of criminal appeals has recently clarified *Clewis* addressing the factual sufficiency standard of review. *See Johnson v. State,* No.1915-98, 2000 WL 140257, at *8 (Tex.Crim.App. Feb. 9, 2000)(mandate issued May 3, 2000). The court of criminal appeals held, in pertinent part:

> We hold, therefore, that our opinion in *Clewis* is to be read as adopting the complete civil factual sufficiency formulation. Borrowing in part from Justice Vance's concurring opinion in *Mata v. State*, 939 S.W.2d 719, 729 (Tex.App.--Waco 1997, no pet.), the complete and correct standard a reviewing court must follow to conduct a *Clewis* factual sufficiency review of the elements of a criminal offense asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof.

Johnson, 2000 WL 140257, at *8.

D.H. testified that she was thirteen years of age at the time of the offense, and that she was staying with her grandparents when the assault occurred. D.H. testified that she was braiding her two-year-old sister's hair when appellant came into the room. D.H.'s sister left the room, and appellant pulled her pants down and inserted his penis in her vagina. The evidence is legally sufficient to prove aggravated sexual assault of a child under fourteen years of age. TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i) (Vernon 1994 & Supp. 2000)([A] person commits an offense if the person intentionally or knowingly causes the penetration of . . . the female sexual organ of a child by any means). Appellant's argument that D.H.was not credible was for the jury. *Chambers,* 805 S.W.2d at 462. The testimony of a victim standing alone, even when the victim is a child, is sufficient to support a conviction for sexual assault. *Ruiz v. State,* 891 S.W.2d 302, 304 (Tex.App.–San Antonio 1994, pet. ref'd). We find that a rational trier of fact could find appellant intentionally and knowingly caused his sexual organ to penetrate the female sexual organ of D.H., a child under the age of fourteen years. Appellant's contention that the evidence is legally insufficient to sustain his conviction is overruled.

Under point one, appellant further argues the same evidence is factually insufficient. D.H. testified that appellant inserted his penis in her vagina. Appellant did not testify. The only defensive evidence was reputation testimony from several relatives of D.H. to the effect D.H. tended to lie sometimes. Appellant argues there was no physical evidence of sexual abuse, and Dr. William's opinion was inconclusive. Appellant's argument goes to the weight and credibility of the evidence. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id*. at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id*. at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis*, 922 S.W.2d at 129. We have examined all of the evidence impartially, a neutral review, and do not find that proof of murder is so "obviously weak as to undermine confidence in the jury's determination." *Johnson*, 2000 WL 140257, at *8. Under the new *Clewis-Johnson* test, we further find that the proof of guilt is not greatly outweighed by appellant's contrary proof of D.H.'s reputation for truth and Dr. William's inconclusive opinion. *Id*. Considering all of the evidence, measuring it against the charge (here, correctly given), and giving due deference to the role of the jury as fact finder, we cannot say that the finding of guilt, beyond a reasonable doubt, is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Reaves v. State*, 970 S.W.2d 111, 118 (Tex.App.-Dallas 1998, no pet.). The evidence is factually sufficient to sustain appellant's conviction, and we overrule appellant's point of error one.

In point two, appellant contends he received ineffective assistance of counsel for the following reasons:

1. Although a pretrial hearing was held on appellant's motion in limine, trial counsel failed to file the motion and the trial court's order thereon.

2. Failure to investigate the CPS investigation prior to trial resulting in the admission of testimony by the CPS worker concerning extraneous offenses involving appellant and the child victim.

3. Failure to object to hearsay testimony by the CPS investigator concerning extraneous sexual contacts by appellant with D.H.

Appellant failed to file a motion for new trial and conduct a pretrial hearing to develop evidence as to his trial counsel's reasons for acting as she did. There is nothing in the record to show why counsel failed to file a motion in limine, conduct a more complete investigation of the CPS worker's investigation, or object to the hearsay testimony of the CPS worker about sexual contacts by appellant with D.H.

Claims of ineffective assistance of counsel are evaluated under the two-step analysis articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). The first step requires appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this step, appellant must identify the acts or omissions of counsel alleged as ineffective assistance and affirmatively prove they fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex.Crim.App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Strickland*, 466 U.S. at 695.

The second step requires appellant to show prejudice from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex.Crim.App. 1999). To establish prejudice, an appellant must prove that but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim.App.1994) (en banc). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* Appellant cannot meet this burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex.Crim.App. 1998)

(inadequate record on direct appeal to evaluate whether trial counsel provided ineffective assistance); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex.App.–Corpus Christi 1992, pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim); *see also Beck v. State*, 976 S.W.2d 265, 266 (Tex.App.–Amarillo 1998, pet. ref'd) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim). A record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston [1st Dist.] 1994, pet. ref'd).

In our case, the record is completely silent as to the reasons appellant's trial counsel chose the course she did. Therefore, the first prong of *Strickland* is not met in this case. Because appellant did not produce evidence concerning trial counsel's reasons for choosing the course she did, we cannot find that appellant's trial counsel was ineffective. Appellant's point of error two is overruled.

In point three, appellant contends the trial court erred by admitting hearsay testimony in violation of his ruling on appellant's motion to exclude hearsay "outcry" statements offered under article 38.072, Texas Code of Criminal Procedure. Article 38.072 applies to prosecutions committed against a child 12 years of age or younger, and applies only to outcry statements that described the alleged offense. Specifically, appellant argues the CPS worker was improperly allowed to testify to extraneous sexual acts by appellant with D.H. in prior years. Appellant's objection at trial was the testimony was hearsay. Appellant made no objection that in anyway mentioned the trial court's ruling on appellant's motion to exclude "outcry" witness testimony under article 38.072.

The State gave notice to appellant several months before trial that it intended to introduce evidence of seven instances of sexual conduct by appellant which occurred prior to the charged act in 1997. At the pretrial hearing, the trial court specifically found that all of these instances except one were admissible under article 38.37, Texas Code of Criminal Procedure. The six extraneous acts allowed by the trial court were "pursuant to a continuing course of criminal activity" from 1994 to July 1, 1997 (the date of the charged offense in the indictment) with D.H. The one extraneous act not allowed by the trial court concerned a sexual assault by appellant upon another child. Article 38.37 specifically permits evidence of other "crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense" to

be admitted for "its bearing on relevant matters." TEX. CODE CRIM. PROC. ANN. art. 38.37, Sec. 2 (Vernon 1994 & Supp. 2000); *See Howland v. State*, 966 S.W.2d 98, 101-102 (Tex.App.–Houston[1st Dist.] 1998), *aff'd*, 990 S.W.2d 274 (Tex.Crim.App.1999).

At trial, appellant objected on the ground the testimony was hearsay. Appellant made no objections regarding the violation of the trial court's order excluding "outcry" statements under article 38.072. Because his trial objection does not comport with the issue raised on appeal, he has preserved nothing for review. TEX. R. APP. P. 33.1(a); *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex.Crim.App. 1999). *See also Gallegos v. State*, 918 S.W.2d 50, 56 (Tex.App.-Corpus Christi 1996, pet. ref'd) (at trial, appellant objected to CPS worker's testimony of extraneous sex acts with child victim by appellant on grounds of hearsay; on appeal, appellant complained that such acts were not related to the "alleged offense" under article 38.072; court of appeals held that nothing was preserved for review because objection at trial differed from complaint on appeal). We overrule appellant's point of error three.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed September 7, 2000.
Panel consists of Justices Cannon, Draughn, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.