Affirmed and Opinion filed September 13, 2001.

In The

Fourteenth Court of Appeals

NOS. 14-99-01197-CR & 14-99-01200-CR & 14-99-01201-CR

ROLAND RAMOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause Nos. 98CR0765, 98CR0766, and 98CR0767

O P I N I O N

Appellant, Roland Ramos, was charged by three indictments with aggravated sexual assault of a child, J.A., in cause number 98CR0765; another aggravated sexual assault of the same child, J.A., in cause number 98CR0767; and indecency with a child, V.R., in cause number 98CR0766. A jury found appellant guilty of all three charges and sentenced appellant to thirty years' confinement for the aggravated sexual assault of J.A., twenty-five years' confinement for the additional aggravated sexual assault of J.A., and fifteen years' confinement in the Institutional Division, of the Texas Department of Criminal Justice, for his acts of indecency with V.R.. A fine of $7,500 was assessed for each separate offense.

The trial court ordered the sentences in cause numbers 98CR0765 and 98CR0767 to run concurrently; however, the sentence in cause number 98CR0766, which involved a different victim, was ordered to commence after completion of the sentences in cause numbers 98CR0765 and 98CR0767.

Appellant asserts the following points of error: (1) the trial court erred in admitting evidence over appellant's objection in cause numbers 98CR0765, 98CR0766 and 98CR0767; (2) the evidence was legally and factually insufficient to support appellant's conviction for the aggravated sexual assault of J.A. in cause number 98CR0767; and (3) the evidence was legally and factually insufficient to support appellant's conviction for indecency with a child, V.R in cause number 98CR0766. We affirm.

F A C T U A L B A C K G R O U N D

In November 1997, appellant and his wife, Kristine, their three children, V.R., M.R., and R.R., along with Kristine's daughter J.A. were living with appellant's mother. On November 22, 1997, appellant returned home around ten o'clock in the evening after an afternoon of fishing and drinking. Appellant and Kristine argued and Kristine left the house for approximately thirty to forty-five minutes. When she returned around eleven-thirty her infant was asleep in his carrier and V.R. and M.R. were asleep with their grandmother. When Kristine opened the door to her bedroom, however, she observed her daughter, J.A., on the same bed with appellant. Significantly, the child was naked from the waist down. Appellant, who was seated on the end of the bed, was also naked. Upon a closer examination, Kristine noticed the child's genitals were red and lubricated with Vaseline. Kristine took J.A. to her neighbor's house, further examined the child, and found two pubic hairs on the child's vagina. Kristine called the Texas City Police Department.

J.A. was immediately taken to the University of Texas Medical Branch Hospital emergency room. After completing an examination of the child, Dr. Adams asked the child to describe what happened. J.A. told the doctor that appellant put Vaseline on her and then placed his hands and penis on her genitals. Dr. Adams told the jury J.A had redness on the

hymen itself, consistent with penetration. Joy Blackmon, a physician assistant at the hospital, testified that J.A. had greasy material on her vulva, and there was an oily sheen on her hymenal tissues. In addition, Dr. James Lukefahr testified that, after the examination of J.A., his findings were consistent with contact being made to the child's genital area.

On November 24, 1997, Kristine gave a written statement to Detective Darrel L. Matheson of the Texas City Police Department. Kristine gave a detailed report regarding the sexual assault of her daughter J.A. The statement was reduced to a printed document and signed by Kristine.

On December 5, 1997, J.A. and V.R. were placed with a foster mother, Catherine Lynskey. While caring for the two girls, Lynskey observed what she called unusual behavior by V.R. She noticed that the child rubbed her genital area with bathtub toys during her bath. Further, V.R. would remove her underwear and rub herself while in bed. V.R. later told Lynskey that her father, appellant, would touch her genital area. V.R. stated that he did not tickle her and that she told appellant "Leave me alone, Daddy."

At trial, both J.A. and V.R. testified from the trial judge's chambers. The jury could see and hear the testimony on a monitor in the courtroom. J.A. testified that appellant touched her "privacy" with his hands and penis. V.R. testified that appellant often touched her "privacy" with his hand.

Sufficiency of the Evidence Standards of Review

We apply different standards when reviewing the evidence for legal and factual sufficiency. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2780, 61 L.Ed.2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*,

895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict. Instead, we view the evidence in a neutral light favoring neither party. *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). To do this, "[t]he court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). In reviewing the evidence weighed by the jury, a reviewing court may find that either the State's evidence was so weak that the verdict was "clearly wrong and manifestly unjust," or the finding of guilt is against the great weight and preponderance of the available evidence. *Id*. at 11. These are the two prongs of the factual sufficiency review of the elements of a criminal offense. We are mindful, however, that we must give appropriate, but not absolute, deference to the judgment of the fact finder so as to not supplant the fact finder's function as the exclusive judge of the weight and credibility given to witness testimony. *Id.* at 7. Because appellant proffered contrary evidence, we will also apply the second prong of the *Johnson* sufficiency test, whether the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Id.* at 11.

I.

Aggravated Sexual Assault of a Child, J.A.:

Legal and Factual Sufficiency

In his second point of error, appellant contends that the evidence at trial was legally insufficient to support his conviction for aggravated sexual assault of J.A.in cause number 98CR0767. Specifically, he asserts there is no evidence he penetrated J.A.'s sexual organ by using his hand or finger.

The Texas Penal Code defines aggravated sexual assault as follows:

(a) [A] person commits an offense:

(1) if the person:..

(B) intentionally or knowingly:..

(i) causes the penetration of the anus or sexual organ of a child by any means;. . . and

(2) if

(B) the victim is younger than 14 years of age.

TEX. PEN. CODE ANN. § 22.021 (Vernon 1994).

Unquestionably, the State must prove beyond a reasonable doubt that the accused is the person who committed the crime charged. *Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *Rice v. State*, 801 S.W.2d 16, 17 (Tex. App.—Fort Worth 1990, pet. ref'd). It is important to note that reconciliation of conflicts and contradictions in the evidence is within the province of the jury. *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986); *Butler v. State*, 981 S.W.2d 849, 853 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). Furthermore, the sufficiency of the evidence is not destroyed by contradictions or conflicts between witnesses' testimony. *Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). When confronted with evidence raising conflicting inferences, a reviewing court must presume that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

Appellant argues there is no evidence he penetrated J.A.'s sexual organ with his hand or finger. Instead, appellant asserts that during J.A.'s testimony she stated that appellant did not put anything else on or in her privacy except his privacy. We hold any rational trier of fact could have found beyond a reasonable doubt appellant committed aggravated sexual assault against J.A. by penetrating her sexual organ with his hand or finger. First, child victims are not expected to testify with the same clarity and ability as is expected of adults. *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990). Second, J.A. testified that appellant touched her privacy with his hand. J.A. testified that

her father used his hands on her privacy. Appellant correctly states that J.A. initially answered "no" when asked if she remembered whether Ramos put anything else on or in her privacy. However, she answered "yes" when asked whether Ramos used his hands with her. The unsophisticated testimony of a sexual assault victim, even a child victim, is sufficient to prove penetration even though her testimony does not track the law word for word. *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978). Moreover, Dr. Adams testified that when she asked J.A. what happened to her, she stated that appellant placed his hand and penis on her genitals. She went on to say that the redness around J.A.'s vaginal area was consistent with penetration or contact with either a finger or penis.

In *Vernon v. State*, the Court of Criminal Appeals addressed a similar issue: when does touching amount to penetration? 841 S.W.2d 407, 408-09 (Tex. Crim. App. 1992). The defendant was convicted of aggravated sexual assault. *Id.* at 408. The victim testified that the defendant touched her only on the outside. *Id.* at 409. She never felt his finger inside. *Id.* The *Vernon* Court affirmed the conviction even though the victim's testimony was contrary to the charged offense; namely, she said there was no penetration. *Id.* at 410. In affirming the conviction, the Court relied on the testimony of a medical expert who testified the victim's injuries were consistent with penetration. *Id.* at 409-10. The *Vernon* Court further noted that actual penetration of the victim's vagina is not an element of the offense. The offense requires penetration of the victim's sexual organ. *Id.* at 410.

In the case at bar, the jury heard J.A.'s testimony that Ramos used his hands on her. They also heard the testimony of her examining physician, Dr. Adams, that the redness of her hymen was consistent with either penetration or contact with either a finger or a penis. She also testified that penetration of the female sexual organ can occur without coming into contact with the hymen. The evidence, both direct and circumstantial, presented to the jury supports their verdict that Ramos penetrated J.A.'s sexual organ with his finger or hand. Viewing the evidence in the light most favorable to the jury's verdict, we conclude a rational trier of fact could have found beyond a reasonable doubt all the elements of the offense of aggravated sexual assault of a child. Thus, appellant's second

point of error is overruled.

In his third point of error, appellant claims that the evidence was factually insufficient to prove beyond a reasonable doubt that he penetrated J.A.'s sexual organ by using his hand or finger. Reviewing the evidence with appropriate deference to the jury's verdict, we find that the evidence is not so weak as to be factually insufficient. Moreover, although appellant testified in his own defense, we also find that this evidence does not greatly outweigh the State's evidence to the extent that the contrary finding is clearly wrong and unjust. *Johnson*, 23 S.W.3d at 11. We find the evidence factually sufficient to support the jury's verdict. Therefore, appellant's third point of error is overruled.

II.

Indecency with a Child, V.R.:

Legal and Factual Sufficiency

In his forth point of error, appellant contends the evidence at trial was legally insufficient to support his conviction for indecency with a child. In particular, he asserts the evidence is legally insufficient to prove that his touching of V.R. occurred with the specific intent to arouse and gratify his sexual desire. We will review the evidence for legal and factual sufficiency as to intent only inasmuch as appellant challenge is limited to the evidentiary support for that element of the offense of indecency with V.R.

Article 21.11 of the Texas Penal Code provides, in pertinent part, that:

> (a) A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:
>
> (1) engages in sexual contact with the child. . . .

TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon 1994). "Sexual contact means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *Id.*, § 21.01(2). The application paragraph of the jury charge authorized the jury to convict appellant if they found appellant intentionally

or knowingly touched V.R in the genital area with his hand or finger with the intent to arouse and gratify the sexual gratification of appellant. Appellant does not argue that he did not touch V.R.; rather, his sole contention is no evidence supports the jury's verdict that the touching was accompanied by the requisite intent. We disagree.

An essential element of the offense of indecency with a child is the intent to arouse or gratify the sexual desire of any person. *Duwe v. State*, 642 S.W.2d 804, 805 (Tex. Crim. App. 1982); *Santos v. State*, 961 S.W.2d 304, 308 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). The requisite specific intent can be inferred from the defendant's conduct, his remarks, and all surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. [Panel Op.] 1981) (requisite intent to arouse and gratify sexual desire found where defendant told the victim he was going to "see if she was clean," then touched her and walked off); *Fetterolf v. State*, 782 S.W.2d 927, 933 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd) (requisite intent to arouse and gratify sexual desire found where the defendant's touching breast of sleeping child awakened her); *Santos*, 961 S.W.2d at 308 (requisite intent to arouse and gratify sexual desire found where defendant reached under victim's blouse and grabbed her breast); *Gottlich v. State*, 822 S.W.2d 734, 741 (Tex. App.—Fort Worth 1992, pet. ref'd) (requisite intent to arouse and gratify sexual desire found where defendant placed his hand inside panties of complainant and played with her "private"); *Hill v. State*, 852 S.W.2d 769, 771 (Tex. App.—Fort Worth 1993, pet. ref'd) (requisite intent to arouse and gratify sexual desire found where defendant placed his mouth on complainant's sexual organ).

The touching of V.R.'s genitals by appellant constitutes conduct from which a jury can infer that it was done with the intent to arouse and gratify appellant's sexual desire, rather than some innocent activity. *Fetterolf*, 782 S.W.2d at 933. In this case, the victim testified that Ramos touched her genitals, and she stated she didn't like it. Moreover, V.R. testified appellant touched her genitals : "[a] lot." These prior touchnings of V.R. by Ramos, though extraneous offenses, were not objected to by appellant. The fact that appelant had committed the same conduct with V.R. in previous, but unspecified

occasions, is of indubitable probative value as to appellant's intent. *See Morgan v. State*, 692 S.W.2d 877, 881 (Tex. Crim. App. 1985) (holding extraneous offense evidence appellant touched complainant in same manner on night before offense charged and on previous occasions to be facts of indubitable probative value as to appellant's intent). Here, following *Fetterolf* and *Morgan*, the jury could rationally infer appellant's intent to arouse and gratify his sexual desire from the conduct of actually touching V.R. on her genitals, and from the fact that he had touched her in the same manner on many prior occasions. We hold the evidence was legally sufficient to permit a rational jury to find that appellant, when touching V.R. on her genitals, had the requisite intent to arouse and gratify his sexual desire. Appellant's forth point of error is overruled.

Appellant raises the exact same arguments to challenge the factual sufficiency of the evidence to support the element of intent. Giving due deference to the jury's assessment of the witnesses' credibility and resolution of evidentiary conflicts, we cannot conclude, after reviewing the evidence in this case, that the State's evidence was so uncertain, improbable, or weak that it would be clearly wrong and manifestly unjust to allow the verdict to stand. *Scott v. State*, 934 S.W.2d 396, 398 (Tex. App.—Dallas 1996, no pet.) Nor can we conclude the verdict is against the great weight and preponderance of the available evidence. *Id.* We overrule appellant's point of error five.

III.

Admission of Written Statement

In appellant's first point of error, he contends the trial court erred in admitting Kristine Ramos' written statement, over defense counsel's objection, claiming a failure to lay a proper predicate. Kristine made a statement regarding the sexual assault of her daughter J.A. to Detective Darrell L. Matheson of the Texas City Police Department. The statement, reduced to a printed document, was signed by Kristine. The State's witness, Detective Matheson, testified that he personally recorded Kristine's statement and that he afforded her an opportunity to review the statement and add material if required.

At trial, the State sought to present evidence of Kristine Ramos' written statement to Detective Darrell L. Matheson of the Texas City Police department. When the State

sought to introduce the written statement into evidence, appellant objected because the State failed to establish a "proper predicate." The trial court overruled appellant's objection and admitted the statement. On appeal, appellant asserts the written statement was inadmissible because the State did not have a legal basis for offering the statement and the statement offered new and harmful facts not in evidence.

Appellant correctly cites the law and the applicable standard of review on the erroneous admission of Kristine Ramos' written statement. Likewise, appellant agrees that the State properly used the written statement to impeach Kristine Ramos's testimony. Rule 613 of the Texas Rules of Evidence allows for the examination of a witness using a prior written statement for the purpose of impeaching inconsistent testimony. TEX. R. EVID. 613. Appellant is correct that a written statement may not be admitted into evidence subsequently unless the witness unequivocally denies making it. *McGary v. State*, 750 S.W.2d 782, 786 (Tex. Crim. App. 1988). Appellant is also correct in stating that admission of the written statement is error, and an objection on the grounds that the evidence lacks a proper predicate is a valid objection to the admissibility of the evidence. *Id.* at 787. Last, appellant correctly states that the error is subject to harmless error analysis. *Johnson v. State*, 967 S.W.2d 410, 416-17 (Tex. Crim. App. 1998) (finding the introduction of hearsay evidence containing extraneous offenses non-constitutional error subject to the harmless error analysis). We disagree with the appellant, however, that the error was harmful.

Texas Rule of Appellate Procedure 44.2(b) requires a reviewing court to disregard non-constitutional errors not affecting appellant's substantial rights. A reviewing court cannot overturn a criminal conviction unless it finds that the error contributed to the conviction beyond a reasonable doubt. *McGary*, 750 S.W.2d at 788. In determining the effect on the jury, the reviewing court should gauge the probable impact on the jury in light of all the evidence, including the overwhelming evidence supporting the conviction. *Westbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988)). In short, the issue is whether the jury, in contemplation

of all the evidence, moved from a position of non-persuasion and acquittal to a position of persuasion and conviction solely on the basis of the erroneously admitted evidence. *Id.* The inquiry into whether the information recorded in Kristine Ramos' written statement moved the jury to convict rather than to acquit involves identifying those extraneous statements and determining whether the jury convicted Roland Ramos based on those extraneous statements or the evidence properly admitted at trial.

Kristine Ramos testified to most of what was written in the statement. Appellant, however, points out that the following statements were not part of her testimony:

1. I wanted out of there also, so he would [not] hit me.
2. When I saw the Vaseline I knew that he had been messing with her. Roland uses Vaseline when he and I have sex. He puts the Vaseline on his penis. I asked Roland "Why does she have Vaseline on her?" He said "I don't know . . . I don't have Vaseline on me."
3. Maxine also saw the pubic hairs.
4. Q. Did you ask J.[A.] if Roland put his mouth on her vagina?
   A. No
5. Q. Does Roland perform oral sex on you?
   A. We have in the past, but not recently. I just had a baby on October 3rd, 1997. He and I argue about this, because I haven't had sex with him since then.
6. Q. Did you ask J.[A.] if she put her mouth on his penis?
   A. No, I didn't.

The first statement implies that Roland Ramos was a physically violent man. Ramos was charged with aggravated sexual assault and indecency with a child. Neither charge alleged Ramos hit his victims. We cannot conclude that, notwithstanding the substantial body of evidence pointing to his guilt, the jury was prepared to acquit Ramos but decided not to based on this particular statement.

The second statement would tend to suggest that if J.A. had Vaseline on her vagina and Roland Ramos uses Vaseline during intercourse as a matter of habit, then he must have sexually assaulted J.A. The jury heard testimony from many sources that J.A. had Vaseline on her vagina. That Roland Ramos uses Vaseline during intercourse with his wife was the only new revelation to the jury. They reasonably could conclude, on their own and

without knowing Ramos' sexual habits, that he might have used Vaseline to commit the sexual assault of a four-year-old child.

The third statement would not have had an effect on the jury's determination because Kristine Ramos testified she saw pubic hairs on J.A. the night of the assault. This evidence was rendered insignificant by properly admitted evidence to the same effect.

The fourth and sixth statements are problematic. They imply two other sexual assaults on this victim. Again, however, we must consider whether the jury was poised to acquit until they read these statements. These were questions asked by an investigating officer the day after the assault. The clear testimony of the victim and her mother was that Roland Ramos placed his hand and penis on J.A.'s vagina. These statements do not suggest appellant committed extraneous offenses with V.R.; rather they suggest Kristine neglected to inquire as to whether appellant had committed other offenses with V.R. At the time of the statement, there was no hint either in the outcry or in the statements of the mother and other witnesses that Roland Ramos had performed oral sex or forced J.A. to perform oral sex the night of the assault. It is apparent that the purpose of the questions was to determine the extent of appellant's conduct. This officer was simply investigating whether there could have been other offenses. That Ramos was not charged with these sexual offenses substantially vitiates any harm potentially arising from the introduction of these statements. Neither statement supports the charged offenses. Because the victim testified the abuse consisted of touching and penetration, and nothing further, we find the questions harmless.

Appellant does not argue how the fifth statement might have prejudiced him. Roland Ramos apparently lost interest in having intercourse with his wife, Kristine, after the birth of their last child. We are unable to find this statement had a substantial and injurious influence in determining the jury's verdict.

We have held the properly admitted evidence presented during the guilt stage of appellant's trial is legally and factually sufficient to support his conviction for the

aggravated sexual assault of J.A. and for indecency with V.R.[1] Therefore we disagree with appellant's contention the statement was much more damaging to him than any of the trial testimony. The potential harm of this information is defused by properly admitted evidence. *King v. State*, 953 S.W.2d 266, 273 (Tex. Crim. App. 1997) (holding erroneous admission of case summaries and disciplinary records consisting of pen packets of previous incarcerations at Texas Department of Criminal Justice did not affect substantial rights of appellant). The probable impact of Kristine's statement on the jury was slight in light of all the evidence, including the evidence supporting appellant's conviction. Because her statement did not contribute to appellant's conviction, it did not affect his substantial rights, and must be disregarded. TEX. R. APP. P. 44.2(b). Accordingly, we overrule appellant's first point of error.

The judgment of the trial court is affirmed.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed September 13, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Appellant has not challenged on appeal his conviction for the other aggravated assault of J.A. in trial court cause number 98CR0765.