

Affirmed and Opinion filed September 14, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01231-CR

DANIEL ALONZO CRUZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 785,278**

OPINION

Appellant was found guilty by the jury of attempted sexual assault and sentenced to ten years' confinement in the Texas Department of Criminal Justice. He presents six points of error on appeal, raising legal and factual insufficiency of the evidence. We affirm.

Complainant, Jasmine Smith, is an adult female who suffers from Down Syndrome. She has the mental capacity of a two-to-five year old child, and enjoys watching cartoons and playing dolls with small children at her mother's apartment complex. She is incapable of carrying on an adult conversation, and works a few hours each week at a local McDonald's

restaurant cleaning tables through the restaurant's special hiring program for the mentally disabled. She lives with her mother.

On August 3, 1997, when Jasmine was twenty-three years old, she was playing with neighboring children at their apartment. She wanted batteries for her radio so she could roller skate and listen to music. The neighbor had no extra batteries, so she went to another neighbor's apartment searching for batteries. Jasmine saw appellant, who lived nearby in the apartment complex, and asked him for batteries. He motioned her into his apartment, and slammed the door behind her. The neighbor became concerned, and alerted Jasmine's mother. Jasmine's mother and the neighbor went to appellant's apartment, where they found Jasmine standing with appellant in his bedroom. Jasmine was partially disrobed, and appellant had one hand on her shoulder and the other hand down by her private parts. Appellant's erect penis was pulled out over his shorts. Jasmine's mother testified that Jasmine had looked "scared to death." The trial court ruled that Jasmine was not mentally competent to testify.

In his first two points of error, appellant alleges that the evidence is legally and factually insufficient to show that complainant's mental incapacity was of such a degree as to render her incapable of appraising the nature of the attempted intercourse or resisting it.

The standard of review for testing legal sufficiency on appeal is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). If, after viewing the evidence, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt, then the reviewing court cannot reverse the judgment on sufficiency of the evidence grounds. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). The reviewing court is not to re-evaluate the weight and credibility of the evidence, but rather, is only to act to ensure that the jury reached a rational decision. See *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

In a review of the factual sufficiency of the evidence, we view all of 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. *Clewis v. State*, 922 S.W.2d at 129. This review must be appropriately deferential so as to avoid substituting this court’s judgment for that of the jury. *Id.* at 133.

Appellant contends that although there was testimony as to Jasmine’s Down Syndrome and her inability to effectively communicate or function beyond the level of a young child, he argues that other evidence suggests to the contrary. Specifically, he points to the fact that she holds a job, graduated from high school, knows not to go into other apartments, and knew how to ask for batteries. He further argues that in absence of medical records or expert testimony as to Jasmine’s mental status and I.Q., the State failed to prove her inability to consent or resist. We have reviewed these allegations, and disagree with appellant. Jasmine’s “job” is cleaning tables a few hours a week under a special corporate program for the mentally retarded. Her high school program was also a specialized program, not a regular mainstreamed curriculum; she is unable to read or write. The uncontroverted evidence showed that Jasmine has no understanding of sex and had very limited capacities for understanding and communicating, and functions on the level of a small child. We do not find Texas law as requiring these facts to be supported with medical records or medical expert testimony, nor has appellant cited any authority that would require such.

Appellant’s first and second points of error are overruled.

By his third and fourth points of error, appellant contends that the evidence is legally and factually insufficient to show that appellant knew of Jasmine’s mental disease or defect that rendered her incapable of either appraising the nature of the attempted sexual intercourse or of resisting it. We apply the same legal standards as for the first two points of error, and in reviewing the evidence, overrule the third and fourth points of error. Testimony from the neighbors established that one month prior to the attempted assault, appellant had asked the

neighbor about Jasmine and was told that Jasmine was a little crazy and had the mind of a three or four year old, to which appellant had replied, "She looks like it." Officer McDaniel, who investigated the offense, testified that when he arrived at the scene, he had immediately noticed that Jasmine had some sort of mental condition. Thus, there was evidence that Jasmine's mental deficiencies were obvious, and that appellant was aware of them.

While appellant cites *Garcia v. State*, 661 S.W.2d 96 (Tex. Crim. App. 1983), as being directly on point with his factual situation and as requiring this court to reverse his conviction, we find *Garcia* to be factually inapposite. In *Garcia*, the complainant herself testified that her mental retardation and disabilities were not obvious and that she had not informed the defendant of her condition. A psychologist testified that the complainant had all the outward appearances of a normal twenty-six year old female, and that any mental deficiencies she might have were obviously latent and unobtrusive to the average person. Although in *Garcia* the complainant's mother had told the defendant that the complainant was mentally retarded, there was no evidence as to what if any details he was given or how the complainant was affected by this mental condition. Here, appellant was directly informed that Jasmine had the mind of a three or four year old.

We overruled appellant's third and fourth points of error.

Finally, appellant argues in his fifth and sixth points of error that the evidence is legally and factually insufficient to show that appellant intended to sexually assault Jasmine. Reviewing the evidence under the applicable standards for review, we find that the evidence is both legally and factually sufficient to show intent to sexually assault. Appellant was found in his bedroom with Jasmine; Jasmine's clothing was partially removed and appellant was standing next to her with one hand on her shoulder and the other hand apparently on her private parts. His erect penis was exposed, pulled over the top of his shorts. The evidence is sufficient to establish that appellant was attempting to sexually assault Jasmine when he was interrupted by Jasmine's mother and the neighbor. Appellant's fifth and sixth points of error are overruled.

The judgment is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed September 14, 2000.

Panel consists of Justices Cannon, Draughn and Lee.*

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