Affirmed and Opinion filed October 21, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00569-CR
NO. 14-97-00572-CR
NO. 14-97-00575-CR
NO. 14-97-00576-CR

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CRAIG GERARD WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351ST District Court
Harris County, Texas
Trial Court Cause Nos. 692,434; 716,196; 716,197; 716,198

O P I N I O N

Craig Gerard Williams appeals four convictions for aggravated sexual assault of a child and indecency with a child on the grounds that: (1) the trial court erred in admitting for impeachment a seven year old felony cocaine possession conviction; (2) the convictions violate appellant's due process rights; and (3) the evidence was not sufficient to support the conviction. We affirm.

Background

Appellant was charged with three counts of aggravated sexual assault of, and one count of indecency with, his then nine year old cousin. One of the aggravated sexual assaults was alleged to have occurred on March 15, 1993, and the remaining two such assaults, as well as the indecency offense, were alleged to have occurred on April 1, 1994. In a single trial, appellant was found guilty and sentenced by a jury for all four offenses. On appeal, appellant has filed four briefs in which four points of error are common to all of the convictions, two points of error are common to two of the convictions, and one point applies to only one conviction. We will address the appeals of all four convictions in this opinion.

Admission of Prior Convictions

The first point of error in each of appellant's briefs argues that the trial court erred in admitting for impeachment appellant's seven year old conviction for felony cocaine possession (the "prior conviction") because its probative value was outweighed by its prejudicial effect.

Evidence of a witness's prior conviction is admissible for impeachment only if: (a) the prior crime was a felony or involved moral turpitude; and (b) the trial court determines that the probative value outweighs the prejudicial effect. *See* TEX. R. EVID. 609(a).[1] A trial court's ruling on the admissibility of prior convictions is reviewable for abuse of discretion. *See Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992).

Error may not be predicated upon a ruling which admits evidence unless a timely objection or motion to strike appears of record, stating the specific ground therefor if the ground was not apparent from the context. *See* TEX. R. EVID. 103(a)(1); TEX. R. APP. P.

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[1] *Compare* TEX. R. EVID. 609(a) (providing that prior conviction will only be admitted if the court determines that the probative value of its admittance *outweighs* the prejudicial effect), *with* TEX. R. EVID. 403 (requiring that evidence be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice). In a standard rule 609(a) balancing analysis, the following factors are considered: (1) the prior conviction's impeachment value; (2) its temporal proximity to the crime on trial and the defendant's subsequent criminal history; (3) the similarity between the prior offense and the present offense; (4) the importance of the defendant's testimony; and (5) the importance of the credibility issue. *See Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992).

33.1(a)(1)(A). The denial of a motion in limine is not sufficient to preserve error. *See McDuff v. State*, 939 S.W.2d 607, 618 (Tex. Crim. App. 1997). A party's objection at trial must also comport with his complaint on appeal. *See, e.g., Trevino v. State*, 991 S.W.2d 849, 854-55 (Tex. Crim. App. 1999).

In this case, after appellant's direct examination, appellant's counsel made a motion in limine regarding the prior cocaine possession conviction on the grounds that it was not an offense that "goes" to appellant's credibility and that the probative value was outweighed substantially by the prejudicial effect. The court denied appellant's motion. When the State cross-examined appellant on his prior conviction, appellant objected based solely on relevance, the trial court overruled the objection, and appellant made no further objection.

Appellant's motion in limine regarding the prior conviction was not sufficient to preserve error. *See McDuff*, 939 S.W.2d at 618. Although appellant made a timely and specific objection to the prior conviction based on relevance, he does not complain of a lack of relevance on appeal. Moreover, appellant did not object at trial to admission of the prior conviction based either on rule 609 or otherwise because its probative value was outweighed by its prejudicial effect. Because appellant's complaint on appeal does not comport with his objection in the trial court, nothing is preserved for our review, and appellant's first point of error is overruled.

Due Process

The second point of error in each of appellant's briefs is that his convictions violate due process in that the verdict cannot be supported under the theory of law and fact submitted to the jury.[2] In particular, appellant argues that the evidence did not establish that the offenses

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[2] *See McCormick v. United States*, 500 U.S. 257, 269-270 & 270 n. 8 (1991) (reversing affirmance that had been based on legal and factual grounds that were never submitted to the jury); *Dunn v. United States*, 442 U.S. 100, 106-07 (1979) (noting that appellate courts are not free to revise the basis upon which a defendant is convicted simply because the same result would likely occur upon retrial); *Cole v. Arkansas*, 333 U.S. 196, 201-202 (1948) (noting that it is as much a violation of due process to imprison an accused upon conviction of a charge on which he was never tried as to convict him on a charge that was never made).

occurred on the exact dates alleged in the indictment and that the State could not rely on the offense merely occurring within the applicable limitations period[3] because the jury charge did not contain the principle of law necessary for the jury to make that determination.

Constitutional notice requirements do not require an indictment to specify the precise date on which the charged offense occurred or even a narrow window of time within which it must have occurred. *See Garcia v. State*, 981 S.W.2d 683, 685-86 (Tex. Crim. App. 1998). This is partly because the primary purpose of specifying a date in the indictment is not to notify the accused of the date of the offense but rather to show that the prosecution is not barred by the statute of limitations. *See id*. at 686. Therefore, when an indictment alleges that a crime occurred "on or about" a certain date, the State can rely on an offense occurring on a date other than the one specifically alleged so long as the date proven is anterior to the presentment of the indictment and within the statutory limitation period[4] and the offense relied upon otherwise meets the description of the offense contained in the indictment. *See Yzaguirre v. State*, 957 S.W.2d 38, 39 (Tex. Crim. App. 1997). This is true even where the jury charge does not define the term "on or about." *See Mireles v. State*, 901 S.W.2d 458, 459 (Tex. Crim. App. 1995). Therefore, the failure of the jury charge in this case to define "on or about" did not violate due process by allowing appellant to be convicted on a theory that was not submitted to the jury, and appellant's second point of error is overruled.

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[3] The statute of limitation applicable to both aggravated sexual assault of a child and indecency with a child is ten years after the complainant's 18th birthday. *See* TEX. CODE CRIM. PRO. ANN. art. 12.01(5) (Vernon Supp. 1999).

[4] Appellant does not challenge the sufficiency of the evidence to prove that the charged offenses occurred before presentment of the indictment and within the statutory limitation period, but only whether the jury charge authorized the jury to make that determination.

Sufficiency of the Evidence

The remaining points of error in each brief challenge the legal or factual sufficiency of the evidence to support appellant's convictions.

Standard of Review

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999). In reviewing factual sufficiency, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Kutzner*, 994 S.W.2d at 184. A factual sufficiency review takes into consideration all of the evidence and weighs the evidence which tends to prove the existence of the fact in dispute against the contradictory evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999).

Credibility of Complainant

The third and fourth points of error in each of appellant's briefs argue that the evidence was legally and factually insufficient to support appellant's conviction because the complainant's testimony incriminating appellant was not credible. In support of his legal and factual sufficiency challenges, appellant's briefs argue that, although the complainant testified that appellant placed his penis in her mouth sometime during 1994, the complainant's testimony of this incident appears to be more of an "after thought" than concrete testimony. The appellant also contends that the complainant's testimony is not credible because the State produced no other witnesses or physical evidence to support it.

The jury is the exclusive judge of the weight and credibility of the evidence at a criminal trial. *See* TEX. CODE CRIM. PROC. ANN. art. 36.13 (Vernon 1981); *Fuentes*, 991 S.W.2d at 271. When assessing the sufficiency of the evidence on appeal, we do not reevaluate the weight or credibility of the evidence. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim.

App. 1993). Because appellant has not shown that the evidence is insufficient, but has only attacked its credibility, and because we may not consider the credibility of the evidence in reviewing legal or factual sufficiency, appellant's third and fourth points of error present no grounds upon which they can be sustained and, accordingly, are overruled.

Aggravated Assault

Appellant's fifth points of error in cause numbers 97-00572-CR and 97-00576-CR argue that although appellant was charged with committing the same aggravated sexual assault on two different dates, under two separate indictments, the evidence of the second assault is legally insufficient because the complainant testified only that appellant "tried" to penetrate her, and the record fails to show whether, in the course of attempting to do so, appellant succeeded in making any contact with the complainant.

In the two indictments, appellant was alleged to have caused the complainant's sexual organ to contact appellant's sexual organ on March 15, 1993, and April 1, 1994. *See* TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(iii) (Vernon Supp. 1999) (defining aggravated sexual assault of a child as intentionally or knowingly causing the sexual organ of a child to, among other things, contact the sexual organ of another person). Child victims cannot be expected to testify with the same clarity and ability as adults; otherwise the law would encourage the victimization of children in order to evade successful prosecution. *See Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990).

In this case, the complainant testified that the second assault occurred while she was in bed. She stated that after appellant pulled her underwear down, "he tried to stick – force his self into me again" by trying to put his penis in her sexual organ. This testimony is sufficient to allow a rational trier of fact to find that appellant caused his sexual organ to contact the complainant's sexual organ. Therefore, the fifth points of error in cause numbers 97-00572 and 97-00576 fail to demonstrate that the evidence is legally insufficient to support appellant's convictions and are overruled.

Indecency

Appellant's fifth and sixth points of error regarding the indecency offense argue that the evidence was legally and factually insufficient because it shows only that appellant touched the complainant's "chest" and not her breasts as alleged in the indictment.

In this case, the indictment on appellant's indecency offense alleges:

> [Appellant] . . . on or about APRIL 1, 1994, did then and there unlawfully, intentionally and knowingly engage in sexual contact with [complainant], a child under the age of seventeen years and not the spouse of [appellant], by touching the breasts of [complainant] with the intent to arouse and gratify the sexual desire of [appellant].

See TEX. PEN. CODE ANN. § 21.11(a)(1) (Vernon 1994).[5] Contrary to appellant's assertion, the complainant specifically testified that appellant touched her chest on her breasts, and appellant's brief cites no contrary evidence. Accordingly, appellant's fifth and sixth points of error regarding the indecency offense fail to demonstrate that the evidence is legally or factually insufficient to support the conviction and are overruled. The judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 21, 1999.

Panel consists of Justices Hudson, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).

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[5] "Sexual contact" includes any touching of the breast of another person with intent to arouse or gratify the sexual desire of any person. *See id.* § 21.01(2).