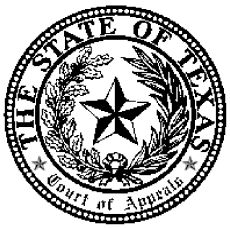
Affirmed and Opinion filed October 11, 2001.



In The

Fourteenth Court of Appeals

NOS: 14-00-00488-CR & 14-00-00489-CR

THOMAS DOMINIC LIBERTY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 805,615 & 805,616

O P I N I O N

Appellant, Thomas Liberty, was charged by indictment with two separate offenses of aggravated sexual assault of a child. A jury found appellant guilty of each charge and sentenced him to twenty years confinement for each offense. In a single point of error on appeal, appellant asserts the evidence was factually insufficient to support his conviction. We affirm.

I. Factual Background

Appellant is the biological father of complainant, a ten-year old girl. As early as the first grade, when complainant began masturbating in class, complainant's teachers suspected

she was a victim of sexual abuse. It was not until complainant attended a Drug Abuse Resistence Education[1] ("DARE") program in the fifth grade that she approached one of her former teachers and declared that her father had been "playing" with her.[2] Complainant told Ms. Smith that her father put his hands on her breast area and her genital area and rubbed lotion all over her body. She also told Ms. Smith that her father would lick her and she would have to lick him. Ms. Smith brought complainant to the school nurse's office and contacted Child Protective Services ("CPS"). CPS began investigating the alleged abuse.

II. Standard of Review

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.

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 apply the second prong of the *Johnson* sufficiency test: whether the proof of guilt, although adequate if taken alone, is greatly

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[1] During the DARE program, complainant learned the difference between "good touching" and "bad touching." This prompted her to approach her favorite teacher and tell her what had been happening to her.

[2] Prior to this, complainant had told her mother several times that her father had been "playing" with her. Unfortunately, complainant's mother did not contact the proper authorities when she obtained this information. Instead, complainant's mother called a family meeting and told complainant's twelve-year old brother to watch his father.

outweighed by contrary proof. *Id*. at 11.

III. Discussion

Complainant asserts that the inconsistencies in the complainant's testimony were so great they render complainant's testimony unreliable, and as such her testimony could not have reasonably been relied upon by the jury in reaching its verdict. Appellant argues that without complainant's testimony, the evidence was factually insufficient to prove any of the elements of aggravated sexual assault.[3] Appellant does not challenge the legal sufficiency of the evidence.[4]

First, appellant directs us to complainant's testimony that "[Appellant] put it in." Appellant argues that by saying "he put it in," complainant meant there was full penile penetration and if there had been full penile penetration, there would be permanent scarring. In support of this explanation, Dr. Zurwan testified that ten-year olds know what "in" means and full penile penetration of a child complainant's age would result in permanent scarring. However, Dr. Lahotit, who examined the complainant, testified that a child complainant's age does not necessarily have an understanding about what is inside and what is outside and thus, by saying "he put it in" complainant probably did not mean full penile penetration.[5] Dr.

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[3] Appellant does not argue that penetration was an element of the offense for which he was convicted. Aggravated sexual assault of a child is defined as "intentionally or knowingly caus[ing] the penetration of the anus or female sex organ of a child by any means; . . . causing the sexual organ of a child to contact or penetrate the mouth, anus, or sex organ of another person, including the actor; . . . and . . . the victim is younger than 14 years of age." TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2001). Thus, penetration is not required. *See id*.

[4] In a legal sufficiency challenge, the issue a reviewing court must resolve is whether a rational jury could have found the essential elements beyond a reasonable doubt. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App.1997). The evidence is viewed in a light most favorable to the verdict. *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998). In contrast, in a factual sufficiency challenge, the evidence is viewed in a neutral light and the reviewing court will only set aside the verdict if it is contrary to the overwhelming weight of the evidence. *Johnson*, 23 S.W.3d at 6–7.

[5] Kimberly Wiseburn, a CPS worker, and Leslie McFarland, a Detective with Harris County Sheriff's Department, also testified that in their experience children do not have the same understanding of full penetration as adults. They also testified that in their experience, in the majority of sexual abuse cases, there is no physical evidence of the abuse.

Lahoti also concluded that complainant's evaluation was consistent with complainant's claims. The evidence presented at trial regarding this statement was, therefore, conflicting.

Second, appellant asserts complainant made contradictory statements. At the CPS interview, complainant said that she was never forced to touch someone's body and denied that she had been forced to put anything in her mouth. However, at trial complainant testified that her father forced her to touch his private parts with her hand and her mouth. On their face, these statements do appear to be conflicting.[6]

Last, appellant emphasizes the evidence he proffered in support of his defense. Appellant employed an investigator to look for traces of semen where the incidents occurred. No semen was found. However, Detective McFarland testified that it is rare to obtain this kind of physical evidence. Appellant also introduced evidence that full penile penetration of a ten-year old would cause lasting injury and that ten-year olds know what "in" means. As previously discussed, Dr. Lahoti testified that children complainant's age do not usually understand "in" the way adults do. Finally, appellant offered testimony by a psychologist who specializes in sexual abuse assessment that children can be greatly influenced by an interviewer and that children fabricate claims of abuse. Thus, the evidence offered by the State and by appellant regarding these points was conflicting.

The crux of appellant's complaint on appeal is that the jury should not have accepted complainant's testimony as credible and the evidence which raised the issue of his innocence should have been given more weight by the jury. Resolution of appellant's complaint is simple. 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,

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[6] One explanation offered for the inconsistency was given by Detective McFarland. She testified that there is a difference between licking something and putting it in your mouth, and complainant never denied being forced to lick her father's genital area. Furthermore, complainant's testimony at trial did not conflict with the statements she made when she first approached her teacher and spoke about the sexual abuse. Finally, the fact that complainant was always consistent about the places the abuse occurred, the perpetrator of the abuse, and the types of things that were done to her substantially mitigates any issue regarding her inconsistencies.

the reconciliation of conflicts and contradictions in the evidence is solely within the province of the jury. *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986). Third, 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). Finally, to avoid substituting our judgment for that of the fact finder's, we must defer to the fact finder's determinations, particularly those determinations which turn upon the credibility and weight of the evidence. *Johnson*, 23 S.W.3d at 9.

Accordingly, we defer to the jury's determinations and find the State's evidence was not so obviously weak that the verdict was clearly wrong or manifestly unjust. In comparing the evidence proffered by appellant to the State's evidence, we find the State's evidence was not greatly outweighed by appellant's evidence.

IV. Conclusion

We overrule appellant's point of error and affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed October 11, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

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