In The Court of Appeals Seventh District of Texas at Amarillo

Nos. 07-19-00298-CR

PATRICK EUGENE NASH, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 242nd District Court
Hale County, Texas
Trial Court No. 20199-1604, Honorable Kregg Hukill, Presiding

May 27, 2020

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Patrick Eugene Nash appeals his conviction for sexual performance of a child through four issues. The prosecution arose after law enforcement officials perused his cell phone via a search warrant and discovered multiple text exchanges with a 16-year-old female (M.G.). The exchanges encompassed the topics of sex and demands for pictures from appellant. M.G. sent him a picture of her bare torso from her navel to the nape of her neck. We affirm.

Issue One

Through his first issue, appellant contends that the trial court erred in denying his request to suppress the text exchanges and picture. Allegedly, those items were outside the scope of the search warrant by which the phone was searched. Purportedly, the warrant permitted a search for data involving the manufacturing and sale of drugs. Appellant orally moved to suppress the evidence during trial, and the trial court excused the jury and heard the matter. During that hearing, the search warrant was marked as a defense exhibit and a witness was questioned about it and its content. Thereafter, appellant argued that the items underlying his prosecution fell outside the scope of the warrant. The State responded by contending, among other things, that it "believe[d] there's been enough testimony here to show that the language was broad in the search warrant in regards to what information could have been obtained and reviewed by the law enforcement agency." The trial court denied appellant's motion upon completion of the hearing.

As can be seen from the record, the litigants referred to the search warrant and its content to support their respective arguments. Despite marking the warrant as a defense exhibit, though, appellant did not tender it into evidence as part of the hearing. Nor is the search warrant part of the appellate record. This is fatal to appellant's current complaint for, without the warrant, we cannot analyze its accuracy. In other words, he failed to provide us with a record sufficient to support his contention, and that was his burden. *Hernandez v. State*, 361 S.W.3d 208, 208–09 (Tex. App.—Amarillo 2012, no pet.) (stating that an appellant has the burden to present a record sufficient to support his contentions). So, we overrule his issue.

Issues Two and Three

Via his next two arguments, appellant questions the sufficiency of the evidence underlying his conviction. He argues that "[t]he record contains no evidence, or merely a 'modicum' of evidence, probative of the element of the offense of whether Appellant induced M.G. to send the offending photo or whether she was even the person who sent it, or in the alternative, the evidence conclusively establishes a reasonable doubt as to those issues."[1] We overrule the issues.

For purposes of these issues, we assume *arguendo* that a minor directing a third-party to send pictures of herself to the accused falls short of sexual conduct. We so assume because that seems to be what appellant implies. But addressing that implication is unimportant to this case since the record contains evidence illustrating M.G. was induced to send the picture at issue to appellant. Not only did he demand pictures of her "panties" and "pussy" during the exchange, she also testified several times that she sent the picture of her breasts. And, though, her testimony was not without contradiction, the jury was free to assess her credibility and decide which portion of her testimony to believe. *See Shafer v. State,* No. 14-15-00372-CR, 2017 Tex. App. LEXIS 1516, at *4–5 (Tex. App.—Houston [14th Dist.] Feb. 23, 2017, no pet.) (mem. op., not designated for publication) (stating that the reviewing court defers to the jury in its role to judge the credibility of witnesses, weigh certain factors, and choose whether to believe some or all of a witness's testimony). Thus, it could have legitimately accepted as true her testimony

[1] One commits sexual performance of a child "if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance." TEX. PENAL CODE ANN. § 43.25(b) (West Supp. 2019). Furthermore, "sexual conduct" includes "lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola." *Id.* § 43.25(a)(2).

that she sent the picture to appellant while conversing with him over the phone. Under that circumstance, and upon viewing the evidence in a light most favorable to the verdict, we conclude that some evidence of record permits a rational trier of fact to find, beyond reasonable doubt, that appellant induced M.G. to send the picture. *Acosta v. State*, 429 S.W.3d 621, 624–25 (Tex. Crim. App. 2014) (stating that we view the evidence in the light most favorable to the verdict to decide whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt).

Issue Four

In his last issue, appellant questions the sufficiency of the evidence establishing the element of lewdness. He posits that "[t]here is certainly no evidence that Appellant took the photograph in question, directed the taking of that photograph, was present when it was taken, or manipulated the photograph in any manner to render it lewd." We overrule the issue.

Per its indictment, the State charged appellant with "intentionally and knowingly induc[ing] a child younger than 18 years of age, namely, M.G., to engage in sexual conduct or a sexual performance, to-wit: a photograph showing the female breast below the top of the areola of M.G." And, as previously mentioned, "sexual conduct" includes the "lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola."[2] Though "lewd" is not defined in the statute, we have construed it to mean "obscene or indecent, tending to moral impurity or wantonness." *Tex. Alcoholic Bev. Comm'n. v. I Gotcha, Inc.*, No. 07-05-0411-CV, 2006 Tex. App. LEXIS 6733, at *9

[2] "Sexual performance" incorporates "sexual conduct" into its definition. *See* TEX. PENAL CODE ANN. § 43.25(a)(1) (defining "sexual performance" as "any performance or part thereof that includes sexual conduct by a child younger than 18 years of age").

(Tex. App.—Amarillo July 28, 2006, pet. denied) (mem. op.). So, apparently the task at hand is to determine whether the record contains some evidence that appellant induced M.G. to exhibit her breasts in an indecent, obscene or morally impure or wanton way. And, in doing so, we consider the circumstances surrounding her sending the picture.

Appellant was an adult married male and asked a 16-year-old female for a picture of her "panties." Upon sending her a picture of him, he reiterated that he wanted a picture of her "now." That led to her sending the visage of her breasts, to which appellant responded, "Dam let me c dat pussy," "U sexy as fuck," and "I love what I c." The various texts admitted into evidence also depicted that M.G. had been sexually active with others, enjoyed sexual activity, and touted some of her sexual abilities to appellant. She also testified that he "asked for a sexy pic." From that context, a fact-finder could reasonably infer that appellant was not merely a male pursuing a clinical study of human anatomy and M.G. was not a naïve participant when the two engaged in the text exchange.

Simply put, the exchange was sexually charged, or so a rational juror could reasonably infer. Indeed, no one suggested to us a morally pure or decent motive underlying a conversation between an adult married male wanting a picture of the "panties" and "pussy" of a minor female and a sexually experienced minor female who understands he wants a "sexy pic" responding with one of her bare breasts. It was during this banter, she took the picture and sent it to him, or so she testified. The foregoing circumstances provided a rational fact-finder basis to reasonably infer that the picture was sent by M.G. to gratify or inflame appellant's salacious appetite and, irrespective of which, it fell within the parameters of a lewd exhibition as contemplated by § 43.25(a)(2) of the Penal Code. *See Lindsey v. State*, No. 05-16-00265-CR, 2017 Tex. App. LEXIS 6368,

at *8–9 (Tex. App.—Dallas July 11, 2017, no pet.) (mem. op., not designated for publication) (wherein the reviewing court considered evidence of appellant demanding a picture of a breast without bra and a "'booty pick (sic) with some sexy panties on'" as sufficient to permit a jury to infer appellant intended the photo to depict the minor as engaging in sexual conduct).

Having overruled each issue, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice

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