

Opinion issued June 23, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-18-00224-CR

JOSE LUIS PONCE, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 400th District Court
Fort Bend County, Texas
Trial Court Case No. 14-DCR-067408**

MEMORANDUM OPINION

Jose Luis Ponce was charged with the felony offense of continuous sexual abuse of a child,¹ his stepdaughter, Rachel.² A jury convicted him of the offense,

¹ See TEX. PENAL CODE § 21.02.

² The complainant is referred to by a pseudonym to protect her privacy.

and the trial court sentenced him to 50 years' confinement. In a single issue, Ponce contends there was legally insufficient evidence that he committed two or more qualifying sexual-abuse acts over a period of 30 or more days. While he concedes Rachel testified that he inserted his fingers into her vagina multiple times over a two-year period, Ponce discounts the evidentiary value of her testimony, characterizing it as "incredible," uncorroborated, and vague.

We affirm.

Background

Rachel testified about living with her stepfather, Ponce, between the ages of four and fourteen. She discussed instances of him inappropriately touching her when she was as young as five years old. Sometimes the physical contact was with his fingers or hands, and other times it was with his penis. The indictment, though, only charged Ponce based on sexual contact with Ponce's "finger" and "hand." Therefore, our review of the record and sufficiency analysis are limited to evidence of sexual abuse involving Ponce's fingers and hands.

Rachel's testimony about Ponce touching her genitals with his fingers and hands centered on events during a two-year period the family lived on Barbosa Street.³ Rachel testified she was in fifth and sixth grades while living in that house.

³ The family moved often. They lived on Barbosa Street from 2009 to 2011, when Rachel was in fifth and sixth grades. In trying to describe what Ponce did when, Rachel often had to refer to which house they were living in at the time to

During those two years, according to Rachel, Ponce would come into her bedroom at night, unbutton or unzip her sleeping shorts, and sexually assault her: “I remember his fingers going inside of my vagina, and him just rubbing me.”

One night, while Rachel’s mother was admitted to the maternity ward of a hospital for the birth of Rachel’s younger brother, Ponce gave Rachel medicine and said it would “calm [her] down.” The medicine made her feel very drowsy, and she fell asleep. She testified that she awoke to find that Ponce had unbuttoned her shorts and had “his hands” “in [her] vagina . . . rubbing . . . back and forth.” She was unable to stay awake or find the strength to push against him. She fell back asleep. She awakened twice more, and Ponce was doing the same thing as before. When she awoke the next time, she pushed him and he stopped.

Rachel testified that, during those two years, she often awoke to find Ponce above her, her shorts opened, and his fingers in her vagina. It would happen the “same way” each time, and it would happen “almost every night” during those two years.

Rachel testified she tried to avoid Ponce and make it more difficult for him to touch her in her sleep. She would wear shorts that had a small buttonhole and were difficult to open. She would lay items across her floor, making it harder to

determine what year the memories were from. For this reason, her testimony was organized by house of residence and grade in school followed by a calculation of what year it would have been.

reach her bed quietly. Despite these efforts, she repeatedly awoke to find Ponce above her, inserting his fingers into her vagina. Rachel was asked if these incidents happened “more than once in fifth grade,” and she confirmed they did, and she was asked if they happened more than once in sixth grade, and, again, she confirmed they did.

Thus, Rachel testified that Ponce inserted his fingers into her vagina during the year she was in fifth grade and during the year she was in sixth grade, which, by necessity, were more than 30 days apart.

Legal Sufficiency of the Evidence

In a single issue, Ponce challenges the legal sufficiency of the evidence on the element of the offense that requires two acts of sexual abuse 30 or more days apart.

A. Standard of review

We review sufficiency of the evidence using the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). *See Brooks v. State*, 323 S.W.3d 893, 898–912 (Tex. Crim. App. 2010). Under that standard, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *See Jackson*, 443 U.S. at 319; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We consider all reasonable

inferences that may be drawn from the evidence in making our determination, including all direct and circumstantial evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Evidence is insufficient in four circumstances: (1) no evidence exists that is probative of an element of the offense in the record; (2) only a “modicum” of evidence exists that is probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the alleged acts do not establish the criminal offense charged. *See Jackson*, 443 U.S. at 314, 320; *Laster*, 275 S.W.3d at 517; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The jury has the exclusive role of evaluating the facts, the credibility of the witnesses, and the weight a witness’s testimony should be given. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981); *Jaggers v. State*, 125 S.W.3d 661, 672 (Tex. App.—Houston [1st Dist.] 2003, pet. ref’d). The jury may choose to believe all, some, or none of a witness’s testimony. *See Davis v. State*, 177 S.W.3d 355, 358 (Tex. App.—Houston [1st Dist.] 2005, no pet.). And the jury alone must reconcile any conflicts in the evidence. *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000).

Under the *Jackson* standard, we defer to the factfinder “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from

basic facts to ultimate facts.” *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. If there are conflicts in the evidence, we must presume the factfinder resolved the conflicts in favor of the verdict and defer to that determination, as long as it is rational. *See Jackson*, 443 U.S. at 326; *Penagraph*, 623 S.W.2d at 343 (“A jury is entitled to accept one version of the facts and reject another or reject any of a witness’[s] testimony.”). Contradictory evidence will not diminish the legal sufficiency of the evidence that supports the verdict. *See McDonald v. State*, 462 S.W.2d 40, 41 (Tex. Crim. App. 1970). If the evidence is insufficient, we must reverse and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

B. Legally sufficient evidence of two or more qualifying acts 30 or more days apart

A person commits the offense of continuous sexual abuse of a child if the person engages in two or more acts of sexual abuse, as defined by the Penal Code, during a period of 30 or more days, while the actor is 17 years of age or older and the child is younger than 14 years of age. TEX. PENAL CODE § 21.02(b) (listing elements of offense); § 21.02(c) (listing acts that statutorily qualify as “act of sexual abuse”). One of the qualifying acts of sexual abuse is sexual assault, which criminalizes intentionally or knowingly causing the penetration of the sexual organ of a child by any means. *Id.* § 21.02(c)(3) (listing sexual assault as qualifying act of sexual abuse); § 22.011(a)(2)(A) (criminalizing sexual abuse and listing

elements of offense); *see Gonzalez v. State*, 337 S.W.3d 473, 482 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (discussing elements of offense).

Rachel, herself, testified that Ponce penetrated her vagina with his fingers more than once during her fifth-grade year and more than once during her sixth-grade year. Her testimony, without corroboration, provides legally sufficient evidence of two qualifying acts of sexual assault that occurred 30 or more days apart to support the jury's verdict. *See Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978) (testimony of sexual-assault complainant, alone, is sufficient to prove offense). Additional corroboration testimony or physical evidence was not required to meet the legal-sufficiency threshold. *See Pena v. State*, 441 S.W.3d 635, 641 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

Ponce argues that Rachel's testimony is vague and "incredible," but neither criticism diminishes the legal sufficiency of her testimony. *See Smith v. State*, 340 S.W.3d 41, 49 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (in appeal of conviction for continuous sexual abuse of child, holding that vagueness as to dates are for the jury to reconcile and do not reduce the complainant's testimony to legal insufficiency); *Mosley v. State*, 355 S.W.3d 59, 70–71 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (holding that jury is exclusive judge of facts and appellate courts must defer to jury's factual determinations because jury hears witness's testimony live and is in best position to judge witness's credibility).

Ponce next notes that Rachel discussed one qualifying event in detail but failed to describe any other specific event in the same detail. He challenges that Rachel’s failure to testify with clarity about “two distinct and articulate facts” causes her testimony to be legally insufficient. Again, we cannot agree. The jury does not have to agree on the exact dates of abuse or on the specific acts committed, only that there were two qualifying acts of sexual abuse during a period of 30 or more days in duration. *See Smith*, 340 S.W.3d at 48. The jury received testimony from Rachel that Ponce inserted his fingers into her vagina multiple times while she was in fifth grade and multiple times the following year when she was in sixth grade. This testimony meets the legal-sufficiency standard.

We overrule Ponce’s sole issue.

Conclusion

We affirm.

Sarah Beth Landau
Justice

Panel consists of Justices Goodman, Landau, and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).