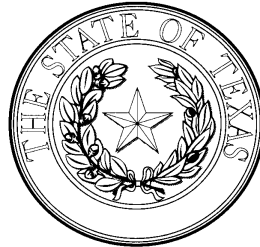


Opinion issued July 14, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00601-CR

OLUWAFEMI OTUNBALOGUN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Case No. 17-DCR-077293

MEMORANDUM OPINION

A jury found Oluwafemi Otunbalogun guilty of the offense of indecency with a child by sexual contact, a second-degree felony. *See* TEX. PENAL CODE § 21.11(a)(1), (c)(2), (d). The trial court assessed Otunbalogun's punishment at 15

years in prison. In one issue, Otunbalogun challenges the sufficiency of the evidence to support the judgment of conviction.

We affirm.

Background

M.M. is Otunbalogun’s daughter. M.M. was born in Nigeria in January 2000 and resided in Nigeria until she was 15 years old. During this time, M.M. lived with her maternal grandmother until she was 14 years old and then lived for one year with her two older sisters, “Rita” and “Valerie.”¹ In September 2015, M.M. and her two sisters moved to Houston to live with their father, Otunbalogun, and his wife (their stepmother) “Tracy.” In February 2016, the family moved to a three-bedroom house in Fort Bend County. Valerie moved out of the house in April 2016 and Rita moved out a couple of weeks later, leaving M.M. to live alone with Otunbalogun and Tracy.

After Valerie and Rita moved out, Otunbalogun began sexually abusing M.M. The first instance of sexual abuse occurred in 2016 when M.M. was 16 years old. M.M. and Otunbalogun had an argument, and Otunbalogun pushed M.M. to the floor. Otunbalogun got on top of M.M., and M.M. started screaming. M.M. testified at trial that Otunbalogun then began “moving on top of [her]” in a manner she described as “humping.” They were both clothed, but she could feel

¹ We use pseudonyms to identify M.M.’s family members other than Otunbalogun.

Otunbalogun's erect penis rubbing on her vagina. Otunbalogun continued to move on top of M.M. for about 10 minutes while she screamed. Otunbalogun covered M.M.'s mouth and then hit her. Otunbalogun stopped "humping" M.M. after he had an orgasm.

Between that incident and her seventeenth birthday, M.M. was subjected to repeated instances of sexual abuse by Otunbalogun. M.M. testified in detail about numerous instances of sexual abuse that occurred in various rooms in the family's home, including episodes of sexual abuse during which Otunbalogun forcibly removed M.M.'s clothing and rubbed his bare penis on the outside of her vagina. One of these episodes occurred when M.M. was in the guestroom of the family's home. M.M. was on her cellphone sitting on what at trial was described as a "ledge" near a window when Otunbalogun entered the room. Otunbalogun had Vaseline in his hand and began masturbating by rubbing his penis in front of M.M. He then took off M.M.'s pants and rubbed his bare penis on the outside of her bare vagina.

At the end of January 2017, one of M.M.'s teachers noticed that M.M. had scratches on her face. M.M. stated that the scratches were caused by her stepmother, Tracy, who had hit M.M. after she had not done her chores. The school reported the physical abuse to child protective services (CPS). M. Salazar, a CPS investigator, interviewed M.M. During the interview, Salazar asked M.M. whether

anyone was sexually abusing her. M.M. indicated that she was not being sexually abused, and she said that she had a good relationship with Otunbalogun.

On February 23, 2017, CPS investigator L. Perry conducted a follow-up interview with M.M. Perry noticed that M.M. appeared “very nervous” and was apprehensive to talk with her. Believing that something was wrong, Perry tried to make M.M. feel comfortable and reassured her that she was safe. M.M. told Perry that “I cannot say it. I can write it.” M.M. then made a written statement followed by a verbal statement to Perry, indicating that Otunbalogun had sexually abused her.

That same day, M.M. underwent a forensic interview at the Children’s Advocacy Center. During the forensic interview, M.M. disclosed more details about the sexual abuse by Otunbalogun. After the forensic interview, M.M. underwent a sexual assault nurse examination. M.M. told the nurse examiner that Otunbalogun had taken off his pants, rubbed his penis “against her butt,” and tried to put his penis in her butt and in her vagina. M.M. also told the nurse examiner that Otunbalogun said that he would buy things for M.M. if she allowed him to have sex with her.

Otunbalogun was indicted for the offense of indecency with a child by contact. The indictment alleged that “on or about December 15, 2016” Otunbalogun “engage[d] in sexual contact with [M.M.], a child younger than 17

years of age, and not the spouse of [Otunbalogun], by causing contact between the body of [M.M.] and the genitals of the Defendant, with the intent to arouse and gratify the sexual desire of [Otunbalogun.]”

At trial, M.M. testified about multiple episodes of sexual abuse by Otunbalogun that occurred when she was 16 years old. She described in detail incidences—including the first time Otunbalogun abused her in the hallway of their home—during which Otunbalogun rubbed his penis on the outside of her vagina while they were both clothed. M.M. also testified in detail about several specific incidences involving skin-to-skin contact during which Otunbalogun forcibly removed M.M.’s clothing and rubbed his bare penis against the skin outside of her bare vagina. M.M. said that this occurred “many times.” When asked whether Otunbalogun had rubbed his penis on her vagina more than 20 times, M.M. responded affirmatively. In addition, M.M. testified that on one occasion Otunbalogun had inserted his finger into her vagina to determine whether she was sexually active with other people.

M.M. indicated that she did not disclose the abuse to anyone before she told Perry because Otunbalogun had said that he would go to jail and lose his job if anyone found out about it. M.M. testified that she did not want that to happen. M.M. testified that she decided to disclose the sexual abuse to Perry because “I was getting tired of it. I wasn’t happy. It happened mostly every day of my life and

I wasn't going to continue with that." M.M. also testified that Otunbalogun told her that he wanted to have sex with her. She stated that, to her, this meant that he wanted "[to] put his penis in my vagina." M.M. believed that Otunbalogun would eventually have sex with her, which scared her.

The State also offered the testimony of M. Brewster, a neighbor who lived across the street from M.M. and her family. Brewster testified that she knew M.M. and Tracy because they had gone to church together and had engaged in other friendly interactions. Brewster testified that she had spoken with CPS after the agency become involved in January 2017. Brewster testified that she had reported to CPS that she had heard M.M. scream one morning. Brewster indicated that she did not know the date that she heard the scream, but it was after Valerie and Rita had moved out of the home. Brewster confirmed that the scream she heard was not a "playful" scream and that, at the time, the scream had alarmed her. She testified that she regretted that she had not called the police when she heard M.M. scream.

In addition, the State called M.M.'s stepmother, Tracy, to testify. During her testimony, Tracy indicated that there was an incident that had stood out to her involving Otunbalogun and M.M. Tracy stated that Otunbalogun had taken M.M. to the master bedroom to discipline her. When Tracy tried to open the bedroom door, it was locked. Tracy thought this was strange and retrieved the key. When Tracy opened the door, she saw Otunbalogun sitting on the edge of the bed with

M.M. kneeling in front of him without any clothing on the top half of her body. Tracy asked Otunbalogun what was happening, and Otunbalogun told her, “This is how we do it in our culture in Nigeria. We talk to our children this way.” Tracy testified that M.M. looked embarrassed. Tracy told M.M. that if it happened again, M.M. should tell Tracy, and Tracy would call the police.

The State’s last witness was Fiona Remko, director of the Children’s Advocacy Center in Fort Bend County. Remko testified that she is a licensed clinical social worker and “a parent/child interaction therapy certified therapist.” Remko stated that, over the course of her career, she had conducted over 11,000 forensic interviews of children and disabled adults. Remko testified that children who are sexually abused often delay disclosing the abuse, particularly when the abuser is a family member. Remko explained that children often believe that “the consequences [of] telling and the things that happen once they finally do tell, are actually worse for them than just living in a home and dealing with their sexual abuse. So they keep it inside.”

Before trial had commenced, Otunbalogun had filed a motion asking the trial court to order the State “to elect the particular event or incident that [the] State will rely upon for conviction.” The trial court granted the motion during trial, ordering the State to elect the incident of abuse on which it would seek Otunbalogun’s conviction for the offense of indecency with a child by contact as alleged in the

indictment.² At the close of its case-in-chief, the State elected to rely on the “incident . . . described by [M.M.] when she was in the guest room on the raised ledge area and [Otunbalogun] caused skin-to-skin sexual contact in which [Otunbalogun] caused his penis (genitals) to contact [M.M.’s] body by rubbing his penis on the outside of her vagina.” The State’s election was read to the jury before the defense presented its case-in-chief and was later included in the jury charge.

In his case-in-chief, Otunbalogun recalled CPS investigator Salazar. He elicited testimony from Salazar that, when she interviewed M.M. in January 2017 about possible physical abuse by Tracy, M.M. told Salazar that she was not being sexually abused. After Salazar testified, the State and the defense signed a stipulation regarding the statements M.M. made to Salazar in lieu of admitting into evidence an audio recording of the interview. The parties stipulated that M.M. had stated to Salazar in January 2017—one month before M.M.’s outcry to Perry—that (1) “no adult was sexually abusing her”; (2) “she was not afraid of her father”; and (3) “she would tell her father if someone was hurting her.” The written stipulation was read to the jury and admitted into evidence.

² Generally, when, as here, the indictment alleges one criminal act and the evidence shows more than one criminal act, the defendant may choose to require the State to elect the specific criminal act that the State relies on for conviction. *See Cosio v. State*, 353 S.W.3d 766, 775 (Tex. Crim. App. 2011); *O’Neal v. State*, 746 S.W.2d 769, 772 (Tex. Crim. App. 1988).

Otunbalogun also called M.M.'s sisters, Valerie and Rita, to testify. Valerie and Rita both testified that they considered M.M. to be an untruthful person who was known to tell lies. They also testified that they never saw Otunbalogun act inappropriately toward M.M. and that they had not seen anything that made them think that M.M. was being sexually abused.

Valerie and Rita testified that, in Nigerian culture, it is common for children to kneel in front of a parent when being disciplined. However, each acknowledged that it is not common to kneel before a parent unclothed. On cross-examination, Valerie and Rita both acknowledged that they were financially dependent on Otunbalogun.

The jury found Otunbalogun guilty of the offense of indecency with a child by sexual contact. The trial court assessed Otunbalogun's punishment at 15 years in prison. This appeal followed.

Sufficiency of the Evidence

In his sole issue, Otunbalogun contends that the evidence was legally insufficient to support his conviction for the offense of indecency with a child by sexual contact.

A. Standard of Review

We review a challenge to the sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See Winfrey v. State*,

393 S.W.3d 763, 768 (Tex. Crim. App. 2013); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Pursuant to the *Jackson* standard, we “consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt.” *Alfaro-Jimenez v. State*, 577 S.W.3d 240, 243–44 (Tex. Crim. App. 2019) (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)); *Jackson*, 443 U.S. at 319). We can hold evidence to be insufficient under the *Jackson* standard when (1) the record contains no evidence, or merely a “modicum” of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 320; *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013).

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326.

In our review of the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper*, 214 S.W.3d at 13. Finally, “[e]ach fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.”

Id.

B. Analysis

Relevant to the charged offense here, Penal Code section 21.11 provides that “[a] person commits an offense if, with a child younger than 17 years of age, . . . the person . . . engages in sexual contact with the child.” TEX. PENAL CODE § 21.11(a)(1). The statute defines “sexual contact” to include “any touching of any part of the body of a child, including touching . . . the genitals of a person” if the touching is “committed with the intent to arouse or gratify the sexual desire of any person.” § 21.11(c)(2).

In the jury charge, the trial court instructed the jury as follows regarding the State’s election of the specific act on which it sought to convict Otunbalogun:³

³ When the State elects the act on which it is relying for conviction, the defendant is entitled to an instruction charging the jury to consider only the elected act in deciding guilt. *McCombs v. State*, 562 S.W.3d 748, 759 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

You are instructed to consider only the act elected by the State in deciding the guilt or innocence of [Otunbalogun] in this indictment. The act elected by the State is the one described by [M.M.] when she was in the guestroom on the raised ledge area by the window and [Otunbalogun] caused skin to skin sexual contact in which [Otunbalogun] caused his penis (genitals) to contact [M.M.’s] body by rubbing his penis on the outside of her vagina.⁴

Otunbalogun asserts that the evidence is legally insufficient to support his conviction because “all the State did here was lead [M.M.] to agree [that] some alleged acts occurred in the . . . guest room.” Contrary to this assertion, the record shows that M.M. gave detailed testimony describing the act of sexual contact in the guestroom and events surrounding it. M.M. testified that she was on her phone in the guestroom, sitting on what was described as “a ledge,” when Otunbalogun

⁴ The charge also provided the following extraneous-offense instruction:

[I]f there is any testimony before you in this case regarding [Otunbalogun] having committed offenses, wrongs, or bad acts, if any, other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that [Otunbalogun] committed such other offenses, wrongs or bad acts, and even then you may only consider the same for the following purposes:

- 1) for its bearing on the state of mind of [Otunbalogun] and the child, [M.M.]; or
- 2) for its bearing on the previous and subsequent relationship between [Otunbalogun] and the child [M.M.]; or
- 3) to determine [Otunbalogun’s] motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.

entered the room. A photograph of the guestroom, admitted into evidence and confirmed by M.M. to depict the guestroom, showed that the ledge was by the window.

M.M. testified that, when he entered the room, Otunbalogun had Vaseline in his hand and started rubbing his penis and masturbating in front of her. M.M. stated that Otunbalogun then “came up to me and he took my pants off and left the Vaseline on his penis and he was rubbing it on my vagina.” When asked whether Otunbalogun was rubbing his penis on the inside or outside of her vagina, M.M. said it was the outside. She recalled that her pants were completely off and that Otunbalogun was wearing shorts. When asked how she was positioned, M.M. testified that she was “kind of standing, but kind of like sitting.” M.M. testified that Otunbalogun rubbed his penis on her for about one minute. She said that neither of them said anything while it happened. M.M. stated that she was 16 years old at the time of the incident. Thus, the record shows that M.M.’s testimony was sufficiently detailed to support Otunbalogun’s conviction. *See* TEX. CODE CRIM. PROC. art. 38.07 (providing that conviction for sexual offenses, including indecency with a child, is supportable by uncorroborated testimony of child victim); *see also Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978) (holding that testimony of complainant, standing alone, was sufficient evidence); *Jensen v.*

State, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (same).

Otunbalogun also challenges the sufficiency of the evidence by asserting that the State did not prove the date on which the sexual contact occurred. The indictment alleged that the offense occurred “on or about December 15, 2016.” “It is well settled that the ‘on or about’ language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period.” *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997). Here, the indictment was presented on March 27, 2017. M.M. testified that the sexual contact that occurred in the guestroom happened before Christmas 2016. Thus, M.M.’s testimony established that the sexual contact in the guestroom occurred anterior to the indictment. And there is no statute of limitations for the offense of indecency with a child. *See* TEX. CODE CRIM. PROC. art. 12.01(1)(E).

Otunbalogun further asserts that the evidence did not show that he had “any intent, nor the mens rea to commit indecency with a child by sexual contact.” In the context of indecency with a child, the finder of fact can infer the requisite intent to arouse or gratify sexual desire from a defendant’s conduct, remarks, and all the surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981); *Jones v. State*, 428 S.W.3d 163, 169 (Tex. App.—Houston [1st

Dist.] 2014, no pet.). No oral expression of intent or visible evidence of sexual arousal is necessary. *Bazanes v. State*, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref'd). Here, the jury could have reasonably inferred from M.M.'s testimony that Otunbalogun engaged in the conduct of rubbing his penis on the outside of M.M.'s vagina to arouse or gratify his sexual desire. *See id.*

Finally, Otunbalogun intimates that M.M.'s testimony is not sufficient evidence to support his conviction because her credibility is questionable. Otunbalogun points out that M.M. denied that she had been sexually abused when interviewed by CPS investigator Salazar in January 2017, 30 days before she disclosed the abuse to CPS investigator Perry in February 2017. M.M. indicated that she did not disclose the abuse to anyone before she told Perry because Otunbalogun had said that he would go to jail and lose his job if anyone found out about it. M.M. testified that she did not want that to happen.

M.M. testified that she finally decided to disclose the abuse because she was “getting tired” of it. She said that she “wasn’t happy” because the sexual abuse “happened mostly every day of my life,” and she had decided that she “wasn’t going to continue with that.” M.M. also testified that she feared Otunbalogun would soon have sexual intercourse with her. The jury also heard the testimony of Fiona Remko, director of the Children’s Advocacy Center. Remko testified that

children often delay disclosing sexual abuse, particularly when the abuser is a family member.

Otunbalogun also points out that M.M.’s sisters, Valerie and Rita, portrayed M.M. as having a history of being untruthful. However, the jury also heard evidence relevant to Valerie’s and Rita’s credibility. For instance, both testified that they were financially dependent on Otunbalogun.

In addition, other witnesses provided testimony that lent support to M.M.’s testimony. The family’s neighbor, M. Brewster, testified that she heard M.M. scream and that the scream had alarmed her. Brewster said that she regretted not calling the police. Tracy, M.M.’s stepmother, testified that after opening the locked door to the master bedroom, she saw M.M. kneeling, naked from the waist up, in front of Otunbalogun. Tracy testified that M.M. looked embarrassed and that Tracy had found the situation to be “very inappropriate.” Valerie and Rita testified that, in Nigerian culture, it is common for children to kneel in front of a parent when being disciplined, but they agreed that it is not common to kneel before a parent unclothed.

In our review, we are mindful that it is the exclusive role of the fact finder “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences[.]” *Buentello v. State*, 512 S.W.3d 508, 516 (Tex. App.—Houston [1st Dist.] 2016, pet. ref’d) (quoting *Jackson*, 443 U.S. at 319). We “may

not re-evaluate the weight and credibility of the record evidence and thereby substitute our judgment for that of the fact-finder.” *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Even contradictory evidence in the record will not diminish the sufficiency of evidence that otherwise supports the jury’s verdict. *Buentello*, 512 S.W.3d at 516. By returning a guilty verdict, we must infer that the jury believed M.M.’s testimony regarding Otunbalogun’s sexual abuse of her in the guestroom. We defer to that determination. *See Jackson*, 443 U.S. at 318–19.

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational fact finder could have found, beyond a reasonable doubt, each element necessary to support the finding that Otunbalogun committed the offense of indecency with a child by sexual contact. *See id.*; *see also* TEX. PENAL CODE § 21.11(a)(1), (c)(2). Accordingly, we hold that the evidence was sufficient to support the judgment of conviction.

We overrule Otunbalogun’s sole issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Keyes, Goodman, and Hightower.

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