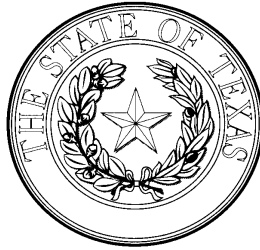


Opinion issued July 21, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00002-CR

JIMMY ANDREW CHAVEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 16-CR-1895

MEMORANDUM OPINION

A jury convicted appellant Jimmy Andrew Chavez of the first-degree felony offense of aggravated sexual assault of a child and assessed his punishment at life imprisonment. In two issues on appeal, appellant argues that: (1) the evidence is insufficient to support his conviction, and (2) the trial court abused its discretion by

admitting the testimony of the State's expert because it indirectly bolstered the victim's testimony. We affirm the trial court's judgment.

Background

Lisa¹ and her children, Sam and Suzy, shared a small apartment with appellant in Texas City from 2006 to 2009. Sam was two years old and Suzy was three months old when they started living with appellant. Lisa and appellant slept in the bedroom, while the children slept in the living room.

Lisa had a full-time job and went to school full-time when she and appellant lived together. When she got off work at 2:30 p.m., Lisa picked the children up from school and took them to her mother's home. Appellant picked the children up from Lisa's mother's home and watched the children until Lisa returned to the apartment around 10:30 p.m. No one else watched the children or had access to them during this time.

Lisa testified that although Suzy was potty trained, Suzy started wetting her bed when she was three-and-a-half years old. She did not notice any other strange behavior. Sam and Suzy were approximately six-years old and four-years old,

¹ To protect the child victim's privacy, we will refer to her and her family members using pseudonyms. *See* TEX. R. APP. P. 9.10(a)(3); *see also* TEX. CONST. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

respectively, when Lisa and appellant broke up and the family moved out of the apartment. Appellant was no longer a part of the children's lives.

In 2015, Lisa and her wife were arguing loudly in their bedroom when Suzy slipped a note to her mother under the door. After reading the note, Lisa asked Suzy to talk to her. According to Lisa, Suzy was crying, scared, distraught, and ashamed. After talking to Suzy, Lisa called the Houston Police Department and reported that Suzy had been sexually assaulted. Suzy, however, started freaking out when the officers arrived, and she refused to talk to them. The officers told Lisa to report the assault to the Texas City Police Department, which is the jurisdiction where the family lived with appellant. Lisa, however, did not file a report with the Texas City Police Department or get Suzy counseling because Suzy begged her not to and told Lisa that she wanted to forget about what had happened to her and did not want to talk about the assault.

About three or four months later, however, when Suzy was ten years old, the girl's school called Lisa because Suzy had brought a knife to school and was threatening to commit suicide. Lisa then took Suzy to a mental hospital, where she stayed for a week. A hospital therapist contacted the Texas City Police Department after Suzy told her about the assault.

Sam, who was fifteen-years old at the time of trial, testified that appellant is his mom's ex-boyfriend and that he, Suzy, and their mother had lived with appellant

years ago, in a one-bedroom apartment. He thought he was about five years old and Suzy was three years old when they lived in the apartment.

Sam testified that if he or Suzy got in trouble, appellant would spank them with a belt, threaten to hit them more, and threaten to put them in a closet. According to Sam, Suzy was appellant's favorite and she and appellant would spend a lot of time together. Sam testified that on several occasions when their mother was not home, appellant would call Suzy into the bedroom and shut the door. Sam did not know what was going on inside the bedroom, but he thought it was weird. Sam never saw appellant and Suzy go into the bathroom together.

Suzy, who was thirteen years old at the time of trial, testified that she had lived in an apartment with her mother, Sam, and appellant when she was little. When her mother was not home, appellant would take her into the bedroom and close the door, while Sam was in the living room. According to Suzy, appellant would tell her to take her clothes off and then he would touch her in her vagina and places that she did not want to be touched, and he forced her to touch his hard, pinkish penis, with her hand. On at least one occasion, appellant took her into the bathroom and put his penis in her mouth. She tried to move away but he "stuck it back in" her mouth and it made her want to throw up. She testified that it happened years ago, she did not know how old she was, but she knew she was little and living in the apartment with her mother, brother, and appellant when the assault occurred.

Suzy testified that she did not tell her mother about the assaults until she was in the fifth grade because she was having nightmares and “flashbacks of him touching me and me crying.” She remembered writing a note to her mother stating that appellant had touched her, but she did not go into any detail about the assault. Suzy testified that she told her mother because she was afraid that her mother would go back to appellant if her mother and stepmother broke up. She also testified that she did not want to tell the police what had happened because she “was scared” and she felt like she could not tell them. Although she had not seen him for years and he had not threatened her, Suzy testified that she was still afraid of appellant and did not want him to do anything to her.

Suzy testified that she brought a knife to school to kill herself because of the sexual assault she had experienced as a child and she was admitted to a hospital for treatment. Suzy admitted that she was also upset because her boyfriend had just broken up with her. Suzy testified that she did not talk about the assaults in any detail because she still did not want to talk about it: “I just told them that he touched me.”

Suzy was interviewed by Cheryl McCarty, a forensic interviewer from the Children’s Advocacy Center. McCarty explained there are times a child might tell a forensic interviewer something that they are not able to say outside an interview room. McCarty testified that although Suzy was quiet and hesitant at times, she nevertheless made disclosures of sexual assault to McCarty.

Detective Jeffrey Baugh, the lead investigator on the case, testified that, in his experience, a delayed outcry is more common with children than an immediate outcry. He testified that a sexual assault medical exam was not performed on Suzy because several years passed before she made an outcry of sexual abuse and, as a result, there was no chance of recovering biological evidence. A forensic nursing team coordinator, who had not examined Suzy, also testified that sexual assault nurse examiners normally do not collect physical evidence from victims if it has been more than ninety-six hours after the assault because one would not expect to find any injuries or biological evidence after that amount of time.

Dr. Lawrence Thompson testified he is a clinical psychologist and the director of therapy and psychological services at the Harris County Children's Assessment Center. Although he did not interview Suzy, he has worked with hundreds of children, some as young as three years old. Dr. Thompson testified a delayed outcry means that time has passed between the sexual abuse and a child telling. He explained that it is more common to have a delayed outcry. According to Dr. Thompson, shame, fear, guilt, a feeling of responsibility, and sometimes an attempt to protect the perpetrator can lead to the delay, and these feelings do not go away just because the perpetrator has gone away.

Dr. Thompson also testified that it can be difficult for children to say anything about sexual abuse and they may say only what they are comfortable enough to say

under the circumstances. They might be able to share more information later, but the timing and the amount of information they feel comfortable in sharing depends on the individual child. Dr. Thompson explained a child's response to abuse is based on the individual child and can include depression, anxiety, interpersonal difficulties, sexual acting out, suicidal thoughts and actions, and repression that could include no longer being potty-trained. Dr. Thompson testified that some children remember more details over time while some remember less details, and it is not unusual for older children to not be able to remember things that happened when they were younger.

In addition to testifying about delayed and partial disclosures, Dr. Thompson also explained to the jury the concept of grooming. Grooming is behavior that the abuser engages in to win the child's trust, such as coercing the child to keep their secret, making the child feel special, and making the child feel dependent on the perpetrator. In addition to grooming behavior, perpetrators may also use threats, fear, or any kind of manipulation to keep the child from telling. Dr. Thompson testified that adults allow the perpetrator around the child because the perpetrator does not look like someone who would hurt the child. According to Dr. Thompson, abuse can happen with other people in the home or in the same room.

Appellant's friend, Cora Robinson, testified that she would trust appellant with her own children, even if appellant is found guilty of sexual assault of a child.

The landlord of the apartment appellant had shared with Lisa and the children testified that the one-bedroom apartment was so small that the interior doors had been removed. Appellant's defense was that thirteen-year old Suzy was not a credible witness because her testimony was inconsistent and contradicted by other witnesses and based on memories of events that allegedly occurred when she was three-years old. Appellant also challenged the lack of corroborating evidence, including medical records from the mental hospital, and suggested that Dr. Thompson's testimony was only intended to bolster Suzy's testimony.

The jury found appellant guilty of aggravated sexual assault of a child by penetrating Suzy's mouth with his penis and, after a hearing, assessed his punishment at life imprisonment. This appeal followed.

Sufficiency

In his first issue, appellant argues that there is insufficient evidence supporting his conviction because there were inconsistencies and contradictions in the witnesses' testimony and there is no physical evidence that corroborates Suzy's allegations of assault.

A. Standard of Review and Applicable Law

We review an appellant's challenge to the sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We examine all the evidence

in the light most favorable to the jury’s verdict to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 318–19; *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012).

“The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses.” *Merritt*, 368 S.W.3d at 525 (citing *Jackson*, 443 U.S. at 319). As the sole factfinder, the jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *See Canfield v. State*, 429 S.W.3d 54, 65 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d); *see also Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). We presume that the jury resolved any conflicting inferences in favor of the verdict and defer to that resolution. *See Jackson*, 443 U.S. at 326. Our role is to determine whether the jury’s inferences are reasonable “based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.” *Hooper v. State*, 214 S.W.3d 9, 17 (Tex. Crim. App. 2007). In viewing the record, direct and circumstantial evidence are treated equally. *Id.* at 13.

As relevant here, a person commits the offense of aggravated sexual assault of a child if the person intentionally or knowingly “causes the penetration of the mouth of a child by the sexual organ of the actor.” TEX. PENAL CODE

§ 22.021(a)(1)(B)(ii), (a)(2)(B). A child sexual assault complainant's uncorroborated testimony, standing alone, is sufficient to support a defendant's conviction. *See* TEX. CODE CRIM. PROC. art. 38.07 (stating conviction for sexual assault is supportable on uncorroborated testimony of victim if victim informed any person, other than defendant, of offense within one year, but requirement does not apply if at time of alleged offense victim was person seventeen years of age or younger).

B. Analysis

The indictment alleged that appellant sexually assaulted Suzy by “intentionally or knowingly caus[ing] the penetration of the mouth of [Suzy], a child who was then and there younger than 6 years of age, by [appellant's] sexual organ.”

Suzy testified that appellant took her into the bathroom when her mother was not home and stuck his penis inside her mouth. She did not remember how old she was, but she knew that she was very young and had been living in an apartment with her family and appellant when the assault occurred. Lisa testified that Suzy lived with appellant from the time she was three months old until she was four years old and he was not in Suzy's life after that time. Suzy testified that she waited to tell anyone about the assault, and she explained why it took her several times before she was finally able to tell someone everything that had happened.

Suzy's uncorroborated testimony, coupled with Lisa's testimony that Suzy lived with appellant from the time she was three months old until she was four years old, is sufficient to support appellant's conviction for the offense of aggravated sexual assault of a child. *See id.* To the extent that there are inconsistencies in her testimony or conflicting evidence in the record, it was the jury's duty as the sole factfinder to assess Suzy's credibility and to resolve any conflicts in the evidence or her testimony. We presume that the jury resolved any conflicting inferences in favor of the verdict and defer to that resolution. *See Jackson*, 443 U.S. at 326.

Appellant argues that the evidence is insufficient to prove that he committed aggravated sexual assault against Suzy because there is no evidence that corroborates her claims of assault, such as physical evidence, Suzy's medical records, or the note Suzy passed her mother.

As previously stated, the uncorroborated testimony of the child victim can be sufficient to support a defendant's conviction. *See* TEX. CODE CRIM. PROC. art. 38.07; *see also Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978) (holding victim's testimony of penetration by defendant, standing alone, was sufficient); *Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (stating testimony of victim, standing alone, was sufficient). Furthermore, the State has no burden to produce physical, medical, or other corroborating evidence. *See Jones v. State*, 428 S.W.3d 163, 169 (Tex. App.—

Houston [1st Dist.] 2014, no pet.); *see also Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004) (holding that medical or physical evidence is not required to corroborate child victim’s testimony), *aff’d*, 206 S.W.3d 620 (Tex. Crim. App. 2006). To the extent the lack of this or other evidence could serve to undermine Suzy’s or any other witness’s credibility, it was the jury’s duty as the sole factfinder to assess Suzy’s credibility and to resolve any conflicts in the evidence or her testimony. *See Chambers*, 805 S.W.2d at 461; *Canfield*, 429 S.W.3d at 65. We presume that the jury resolved any conflicting inferences in favor of the verdict and defer to that resolution. *See Jackson*, 443 U.S. at 326. The jury determines the credibility of the witnesses and may “believe all, some, or none of the testimony.” *Chambers*, 805 S.W.2d at 461; *see also Canfield*, 429 S.W.3d at 65.

Appellant challenged the reliability of Suzy’s memories, pointed out conflicting or contradictory testimony, and the lack of corroborating evidence, including Suzy’s medical records. Based on its verdict, the jury was not persuaded by appellant’s arguments, and apparently found Suzy’s testimony to be credible. After reviewing all of the evidence in the light most favorable to the jury’s verdict, and giving due deference to the jury’s weight and credibility determinations, we conclude that, on the evidence presented, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 318–19; *Brooks*, 323 S.W.3d at 899. We overrule appellant’s first issue.

Admission of Testimony

In his second issue, appellant argues that the trial court abused its discretion by admitting Dr. Thompson's testimony because it indirectly bolsters Suzy's testimony in violation of Criminal Rule of Evidence 702.

We review a trial court's decision to admit expert testimony for an abuse of discretion. *See Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019); *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018) (citations omitted). "The trial court abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably." *Rhomer*, 569 S.W.3d at 669. A "trial court's decision to admit or exclude evidence will be upheld as long as it was within the 'zone of reasonable disagreement.'" *Beham*, 559 S.W.3d at 478.

Expert testimony that a particular witness is truthful is inadmissible under Texas Rule of Evidence 702. *See Yount v. State*, 872 S.W.2d 706, 711 (Tex. Crim. App. 1993); *see also* TEX. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue."). An expert may not give an opinion that a complainant, such as a sexual assault victim, or the complainant's class is truthful. *See Yount*, 872 S.W.2d at 712. Expert testimony concerning general behavioral characteristics of sexually abused

children, however, is admissible because it “helps the jury understand the seemingly illogical behavior of the child who changes her story, seems confused, and does not immediately disclose a sexual assault.” *Dennis v. State*, 178 S.W.3d 172, 182 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d) (citing *Duckett v. State*, 797 S.W.2d 906, 915–16 (Tex. Crim. App. 1990), *disapproved on other grounds by Cohn v. State*, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993)).

The State argues that appellant’s objection was not sufficient to preserve this issue for our review. Even assuming without deciding that appellant had preserved this issue for our review, appellant is still not entitled to relief on this ground because we cannot conclude that the district court abused its discretion by admitting Dr. Thompson’s testimony.

In this case, the trial court could have reasonably concluded that Dr. Thompson’s testimony was admissible because he was discussing behavioral characteristics of sexually abused children in general, and explaining to the jury why a child’s statements regarding past sexual abuse can, and often do, change over time.

Dr. Thompson, who had never met Suzy, testified generally about the concept of grooming, delayed and partial outcries of sexual abuse, symptoms of sexual abuse exhibited by child victims, and the effect of time on memory. He did not direct his testimony to the particular facts of the case but talked generally about sexual abuse victims. He did not testify that Suzy’s allegations had merit, Suzy was a trustworthy

witness, or that children as a class are truthful. Therefore, we conclude that the trial court's decision to admit this testimony over appellant's objection did not constitute an abuse of discretion. *See Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008) (stating trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree"). We overrule appellant's second issue.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

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