AFFIRM; Opinion Filed June 11, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01120-CR
No. 05-19-01127-CR

KEVIN JONES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 401st Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 401-80295-2018, 401-82548-2019

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Schenck

A jury convicted Kevin Jones on two counts of indecency with a child by sexual contact and on one count of indecency with a child by exposure. In four issues, appellant challenges the sufficiency of the evidence to support his convictions and asserts the trial court deprived him of his right to present a complete defense by limiting his cross-examination of a State's witness. We affirm the trial court's judgments. Because all issues are settled in the law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

With respect to complainant A.W., appellant was charged by indictment with one count of continuous sexual abuse of a child and one count of indecency with a child by sexual contact. TEX. PENAL CODE ANN. §§ 21.02; 21.11(a)(1). With respect to complainant J.W., appellant was charged by indictment with one count of sexual abuse of a child, four counts of indecency with a child by sexual contact, and one count of indecency with a child by exposure. *Id.* §§ 21.11(a)(1), 21.11(a)(2)(A). Appellant pleaded not guilty as to both indictments and proceeded to a jury trial.

The evidence presented to the jury established the following. A.W. and J.W. are half-sisters. They share the same father and have different mothers. They do not have a relationship with their biological father, but they maintain a close relationship with each other. At the time of trial, A.W. was sixteen years old and J.W. was twenty-two.

A.W. was around seven years old when her mother married appellant. When A.W. was around eleven years old, appellant began doing things to her that she did not like. She claimed the first incident occurred when she and appellant were home alone and appellant asked her to watch television with him in the master bedroom. She recalled appellant ripped off her pants and shirt and then took off her underwear. She tried to run away, but the bedroom door was locked. She claimed appellant pushed her onto the bed and sexually assaulted her. The incident ended when A.W.'s

mother arrived home and opened the garage door. A.W. ran and locked herself in her bathroom until her mother called her downstairs.

A.W. further claimed that when she was around thirteen appellant asked her to sit on his lap in his home office. He touched her under her clothes. This happened three or four times, but not after she turned fourteen. The first person A.W. told about the abuse was a friend at Universal Behavioral Health, a hospital to which A.W. was admitted due to self-cutting. She then also told her therapist.

J.W. viewed A.W.'s mother as a step-mom, and on occasion, J.W. visited with A.W. J.W. first met appellant at A.W.'s maternal grandmother's house when she was in the sixth grade. At first, appellant was like a real father in J.W.'s life. J.W.'s relationship with appellant changed over time. J.W. described "touchy playful moments" that started when she was in the seventh grade, where appellant would progress from tickling to poking and grabbing her chest. J.W. was confused by the contact, but mainly minimized it.

When she was in the eighth grade, J.W. was accused of having engaged in sexual acts with a boy at school. She was sent to appellant's home to learn the consequences of having unprotected sex by having to take care of appellant's infant son, who was living with appellant and A.W.'s mother. While she was there, appellant discussed sex with her. At first, the talk was informative. Appellant discussed condoms with J.W. He asked her if she knew how to use a condom, and

she said "no." He tried to demonstrate the use of a condom with an aerosol can without success. Appellant then demonstrated in an unlawful manner. That same day, appellant advised J.W. about trimming her pubic hair and washed her back while she was in the shower and touched her illegally. This contact ended when J.W. asked, "[W]hen is mom coming home?"

On another occasion, appellant, A.W., and J.W. went to Austin to celebrate A.W.'s birthday. They stayed at a hotel. A.W. and J.W. slept on the sofa bed, and appellant slept on the regular bed. After A.W. fell asleep, appellant led J.W. to the regular bed and sexually abused her.

On a separate occasion, appellant took J.W., A.W., and A.W.'s brother, A.R., to his motorcycle club. J.W. was sixteen or seventeen at the time. Appellant took J.W. upstairs while A.W. and A.R. played darts downstairs. The upstairs had a large table, several beds, and a flat screen television. J.W. described various sex acts that occurred between her and appellant that day. She indicated that she was a willing participant in the acts. After that, J.W. stopped going to appellant's home because she was confused about their relationship.

Following A.W.'s outcry, the McKinney Police Department received a referral from CPS leading to appellant's arrest. Thereafter, police received information that J.W. might also have been subjected to abuse. Police contacted J.W. and set up a forensic interview. J.W. made an outcry during the interview.

J.W. and A.W. were both interviewed at the Child Advocacy Center in Collin County. Both were able to give sensory details of the abuse. One red flag was raised during A.W.'s interview. She mentioned that her parents were going through a divorce. The interviewer's concerns were alleviated through further exploration of the matter.

Appellant did not testify during the guilt-innocence phase of trial, but he did call witnesses on his behalf. A member of his motorcycle club testified about the existence of security cameras at the clubhouse. Another motorcycle club member testified that members could obtain a telephone application by which they could contemporaneously view the cameras as they recorded, thus suggesting either appellant would not have engaged in sex acts at the clubhouse or, if the acts had in fact occurred, someone would have seen and reported them.

A middle school teacher who is married to one of the motorcycle club members testified she is trained to see the warning signs of abuse. She claimed she never saw any warning signs with appellant.

With respect to A.W., the jury found appellant guilty of indecency with a child by sexual contact. With respect to J.W., the jury found appellant guilty of indecency with a child by sexual contact and indecency with a child by exposure.[1] The jury

[1] Appellant was acquitted of one count of continuous sexual abuse of a child charged in cause number 401-80295-2018 (the case concerning A.W.). Appellant was acquitted of one count of sexual assault of a child

assessed punishment at 4 years' confinement in the Texas Department of Criminal Justice for each conviction. The trial court ordered the sentences to run consecutively.

DISCUSSION

I. Sufficiency of the Evidence

In his first three issues, appellant challenges the sufficiency of the evidence to support his convictions. We review the sufficiency of the evidence under the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013). We examine all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Matlock*, 392 S.W.3d at 667. This standard recognizes "the responsibility of the trier of fact fairly 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. As the fact finder, the jury is entitled to judge the credibility of the witnesses, and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). We defer to the jury's determinations of credibility, and

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and one count of indecency with a child by contact in Cause Number 401-82548-2019 (the case concerning J.W.). The State abandoned two other counts in Cause Number 401-82548-2019.

may not substitute our judgment for that of the jury. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). When there is conflicting evidence, we presume the factfinder resolved the conflict in favor of the verdict and defer to that resolution. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

The testimony of a victim alone, even if that victim is a child, is sufficient to support a conviction for sexual assault of a child. TEX. CODE CRIM. PROC. ANN. art. 38.07(b); *Revels v. State*, 334 S.W.3d 46, 52 (Tex. App.—Dallas 2008, no pet). Corroboration of a child victim's testimony by medical or physical evidence is unnecessary. *Rodriguez v. State*, No. 05-18-01448-CR, 2020 WL 881008, at *4 (Tex. App.—Dallas Feb. 24, 2020, no pet.) (mem. op., not designated for publication).

In his first issue, appellant urges the evidence is insufficient to support the jury's finding he committed the offense of indecency with a child by contact as to A.W. More particularly, appellant claims A.W. was not credible, as evidenced by the jury's acquittal on the more serious count of continuous sexual abuse, and testimony that appellant and A.W.'s mother were going through a divorce. Appellant also argues that A.W. was exposed to information about sexual abuse when she was hospitalized due to cutting and that there were inconsistencies in her

trial testimony and between her testimony and the forensic interview.[2] But Appellant's arguments are explicitly of the kind that the jury alone is empowered to resolve—credibility and weight of evidence arguments. *See, e.g.*, *Cain v. State*, 958 S.W.2d 404, 409 (Tex. Crim. App. 1997) (credibility is a matter for the jury, and the jury was entitled to believe testimony of victim even though he was intoxicated, confused, and contradictory). Appellant cross-examined A.W. about the divorce, and she denied that it affected her or her mother. A.W. denied that her testimony was related to the divorce or money. It was the jury's role to evaluate appellant's attacks on the credibility of her testimony and her responses to those attacks. *See Cain*, 958 S.W.2d at 409. While A.W. admitted to some inconsistency in her recounts of events, she explained that she remembered more details after watching her forensic interview prior to trial. While she admitted that she told the forensic interviewer that appellant touched her breasts over her clothes, she later explained that he touched her breasts *both* over her clothing and inside her bra as she testified on direct examination. Again, these matters are the jury's to resolve. *Cain*, 958 S.W.2d at 409.

[2] At trial, A.W. testified appellant stopped the assault that occurred in the bedroom when he heard the garage door open and that she took the clothes appellant ripped off of her. In her forensic interview, A.W. claimed appellant stopped after she kicked him and she did not know what happened to the clothes she had been wearing.

A.W. testified that on multiple occasions she went into appellant's office while he was working. She would ask him what he was working on. He would tell her and have her sit on his lap. After a while, he would put his hand into her shirt and down her skirt. A.W. would try to push him away with her hands. Appellant also touched her breasts inside of her bra, which hurt when he grabbed her. The forensic interviewer testified that A.W. knew truth from lies and related appropriate details. These facts, viewed in light of the applicable standard of review, are sufficient to sustain the jury's finding appellant guilty of indecency with a child by contact with respect to A.W. *See Rodriguez*, 2020 WL 881008, at *4 (evidence legally sufficient where victim testified to facts of offense even though she was imprecise about times and dates and there was no corroborating evidence). We overrule appellant's first issue.

In his second issue, appellant urges the evidence is insufficient to support the jury's finding he committed the offense of indecency with a child by exposure as to J.W. In doing so, appellant argues that J.W. was not credible based on the jury's verdict of acquittal on more serious charges, the delay in her outcry, and the pending divorce between appellant and A.W.'s mother, who J.W. considered to be a step-mom. But like appellant's arguments concerning A.W., his arguments concerning J.W. are again, beyond the scope of our review. *See, e.g.*, *Cain*, 958 S.W.2d at 409. J.W. explained why she delayed her outcry—she wanted to take her secret to the

grave because she was scared her "mom"—A.W.'s mother—would not love her anymore and because she "did not want to ruin things" for A.W.'s mother and A.W. Moreover, J.W.'s forensic interviewer testified to a number of reasons why a child might delay reporting abuse. The jury therefore had ample basis, as factfinder, to credit J.W.'s testimony despite the delayed outcry.

Appellant also claims the State failed to prove he had the requisite intent because J.W.'s testimony showed the exposure occurred while he was trying to teach J.W. about safe sex and using condoms. But it was the jury's role to determine whether the evidence proved the requisite intent where the testimony is capable of more than one meaning. The evidence established appellant sought J.W.'s assistance during the condom "demonstration" by which he asked her to assist him achieve an erection and engaged in sexual contact with her in the shower immediately after he demonstrated the use of the condom. From these facts, the jury could infer an intent to arouse or gratify. *See Scott v. State*, 202 S.W.3d 405, 408-409 (Tex. App.—Texarkana 2006, pet. ref'd) (evidence sufficient to prove intent to arouse or gratify where Scott claimed he was administering medicine to victim but evidence showed other sexual contact with victim who jury could have found to be old enough to administer medicine herself); *Claycomb v. State*, 988 S.W.2d 922, 926 (Tex. App.—Texarkana 1999, pet. ref'd) (to like effect). The evidence is sufficient to sustain the

jury's finding appellant guilty of indecency with a child by exposure. We overrule appellant's second issue.

In his third issue, appellant urges the evidence is insufficient to support the jury's finding he committed the offense of indecency with a child by contact as to J.W. Appellant advances essentially the same arguments in this issue as he did in his second issue. He claims J.W. was not credible because the jury acquitted him of the more serious offense, her outcry was delayed, and the evidence did not prove the requisite intent but rather "playful" conduct. As noted *supra*, these are explicit attacks on the jury's credibility and weight of evidence determinations—matters which are exclusively in the province of the jury. *See Cain*, 958 S.W.2d at 409.

J.W. testified that appellant would touch her breasts in his truck when he went to pick her up. J.W. described these as "touchy moments" after she developed as a woman. Appellant would progress from tickling to poking and grabbing her chest. He would touch her breasts over her clothing. J.W. was fourteen years old at the time and confused about the touching but mainly laughed it off. This testimony is sufficient to sustain the jury's finding appellant guilty of indecency with a child by contact with respect to J.W. *See, e.g., Revels*, 334 S.W.3d at 52–53 (evidence factually sufficient to sustain conviction where victim testified to facts of offense that happened eight years prior to trial, even though she did not remember certain

details of other matters at the time and gave conflicting responses on other matters). We overrule appellant's third issue.

II. Exclusion of Evidence

In his fourth issue, appellant urges the trial court erred in excluding evidence one of his son's was falsely accused of sexually abusing another son. Appellant contends this evidence tended to show potential abuse of law enforcement and the legal system by other members of the complainants' family.

The trial judge has broad discretion to admit or exclude evidence. *Allridge v. State*, 850 S.W.2d 471, 492 (Tex. Crim. App. 1991), *cert. denied*, 510 U.S. 831 (1993); *McIntosh v. State*, 855 S.W.2d 753, 767 (Tex. App.—Dallas 1993, pet. ref'd). This Court will not reverse the trial judge's decision to admit or exclude evidence unless the trial judge clearly abused his discretion. *Allridge*, 850 S.W.2d at 492. A clear abuse of discretion is shown only where the trial court's determination falls outside "the zone of reasonable disagreement" with regard to the determination. *Montgomery v. State*, 810 S.W.2d 372, 386, 391 (Tex. Crim. App. 1990) (op. on reh'g).

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. TEX. R. EVID. 401. Irrelevant evidence is not admissible. *Id.* 402. A trial court may exclude relevant evidence if its probative value is substantially

outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. *See id.* 403.

Here, the evidence appellant sought to elicit from the investigating detective concerned an accusation that one of appellant's son's abused another one of his sons. That accusation was made by A.W.'s brother, A.R., during a therapy session in which A.R. told his therapist he witnessed a sexual act between two of appellant's sons. The therapist, not a member of the complainants' family, contacted the authorities, and the allegation was investigated. At the conclusion of the investigation, the detective concluded the allegation was unfounded.

This evidence of an unfounded report of potential criminal activity did not involve appellant or the complainants in this case. Nothing in the record establishes the complainants were aware of the allegation or were involved in the report in any way. Thus, this evidence is irrelevant and was properly excluded. *Id.* 402. We overrule appellant's fourth issue.

CONCLUSION

We affirm the trial court's judgments.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KEVIN JONES, Appellant	On Appeal from the 401st Judicial District Court, Collin County, Texas
No. 05-19-01120-CR V.	Trial Court Cause No. 401-80295-2018.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Schenck. Justices Molberg and Nowell participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 11th day of June, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KEVIN JONES, Appellant	On Appeal from the 401st Judicial District Court, Collin County, Texas
No. 05-19-01127-CR V.	Trial Court Cause No. 401-82548-2019.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Schenck. Justices Molberg and Nowell participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

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