AFFIRMED and Opinion Filed July 17, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00597-CR

CHARLES WAYNE BROWN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-83909-2017

MEMORANDUM OPINION

Before Justices Bridges, Pedersen, III, and Evans
Opinion by Justice Evans

Appellant Charles Wayne Brown appeals from the judgment convicting him of continuous sexual abuse of a young child. In two issues, appellant asserts that (1) the trial court erred in denying appellant's request for the lessor included charge of aggravated sexual assault of a child; and (2) the evidence was insufficient to support the conviction for continuous sexual assault of a child. We affirm the trial court's judgment.

BACKGROUND

Appellant was indicted for the offense of continuous sexual assault of a child under fourteen. Appellant entered a plea of not guilty to the indictment.

At trial, Kristina McClain, a detective with the Plano police department, testified that she scheduled the ten-year old complainant for a forensic interview and watched the interview. In the interview, complainant identified her abuser as appellant, who was complainant's sister's—Melanie Ryan—boyfriend. McClain interviewed Ryan since Ryan was the one who had called the police. McClain also learned that appellant's daughter made an allegation of sexual abuse against appellant a few months after complainant and McClain reviewed the daughter's forensic interview. McClain determined that the offense of aggravated sexual assault of a child had taken place against appellant's then four-year old daughter.

Elizabeth Segura is the mother of one of complainant's school friends (the "friend"). The friend and complainant met in first grade and were friends throughout grade school. Complainant spent almost every day at her friend's house, which was just down the block. Segura testified that complainant never wanted to go home. At some point, the friend relayed a concerning conversation she had with complainant to her mother. Segura then spoke with complainant and complainant told her that she was uncomfortable and did not want to go home. Segura then reached out to law enforcement as a result of the conversations.

Ryan, complainant's older sister, testified that she was in relationship with appellant from the time she was thirteen until she was nineteen and had three

children with him. Ryan testified that in 2017 she lived at her mother's house in Plano with her mother, her mother's boyfriend, as well as her brother, youngest sister, complainant, appellant, and her own three children. Ryan lived with everyone at the house for a while, then moved to an apartment with appellant and the children, but eventually moved back into her mother's house. Ryan stated that she lived with her mother for two and a half years. She testified that "[i]n between we did move into our own apartment and then we ended up going back because we lost the apartment. But it was about two and a half years." Ryan stated that they were at her mother's house for a few months, moved into an apartment for about a year, and then back into her mother's house for a year. She also testified that her grandmother relayed some concerning information about complainant and she decided to speak with complainant directly. When Ryan brought up what she had heard, complainant got red in the face and became really nervous. Complainant told Ryan who had done it and Ryan called the police.

Rachel McConnell, a forensic interviewer at the Children's Advocacy Center in Collin County, testified that she conducted the forensic interview with complainant. McConnell was the first person with whom complainant shared the details of the abuse. Complainant told McConnell the first incident with appellant occurred at the end of third grade when appellant had his pants unzipped in front of complainant at the house. Appellant asked complainant if she wanted to see his private part which complainant described as the part men use to go to the bathroom.

Complainant told him no and appellant told her not to say anything. The second incident happened in a bedroom when complainant went to lie down on her sister Jamie's bed. Appellant was drunk and told her he would give her an iPhone 6 if he could put his private part in her mouth. The third incident occurred at the beginning of fourth grade when complainant woke up in her bed and appellant's private part was in her mouth. In the interview, complainant told McConnell she knew it was a private part because she had changed a boy's diaper before and because it was lower on appellant's body. Also, when McConnell asked clarifying questions to complainant about the private part, complainant said it was "white and it felt soft."

The next incident which complainant relayed to McConnell was when appellant took complainant to the apartment pool where he was living with Ryan and explained that Ryan did the things that he wanted complainant to do. In the next incident, complainant was at a birthday party with her family and appellant. Complainant accidentally hit appellant's daughter (J.B.) while playing piñata and appellant said "just put it in your mouth and I will give you an iPhone." Appellant then told complainant that if you ever say anything "it will look bad on you." The last incident took place a week before the forensic interview when complainant was asleep in the living room and woke up with his private part in her mouth.

Complainant then testified that appellant used to be in a relationship with Ryan and that they have three children together. Ryan, appellant and her kids used to live with complainant in her mother's house. Complainant testified that the first

incident happened at the house when she was watching a movie and appellant had his zipper down. Appellant asked if she wanted to see his private part and complainant said no and that she felt confused. Complainant did not tell anyone because appellant told her not to say anything. Complainant then testified that one night she went to her sister Jamie's room to lay down and appellant offered to get her an iPhone if she would put his private part in her mouth. She said no to appellant.

The next incident happened in complainant's room at night and complainant woke up with appellant's private part in her mouth. Complainant testified that she turned the opposite way and appellant left the room. Complainant then testified about a party she attended with appellant and his daughter. Complainant accidentally hit J.B. with the stick for the piñata and appellant pulled her aside to talk to her. Complainant felt that appellant was mad at her and said, "you don't want me to bring it up again." Complainant interpreted this statement to mean appellant was talking about his private part and she felt scared that he would do something again. Later that day appellant told complainant that if she told anybody "he would make it look bad on [her]."

Complainant also testified about an incident that occurred when Ryan and appellant lived at their apartment. Appellant took her to the apartment pool and made her feel uncomfortable when he asked her to do something and complainant asked why "didn't he do that with [Ryan]." Complainant testified that the first person she told about appellant was her friend because she was scared to tell an adult.

Complainant also testified about falling asleep while watching a movie in the living room and waking up with his private part in her mouth. Complainant stated the incident in the living room happened close in time to when complainant spoke with someone at the Children's Advocacy Center. Complainant testified that she was watching Guardians of the Galaxy and fell asleep. When she woke up, complainant testified that appellant was standing in front of her and he had his private part in her mouth. She moved her body in the opposite direction and he went into the kitchen. She further testified that it was early in the morning when it was still dark outside. Complainant could not remember if appellant tried again but remembers her brother's friend Chris came into the house from the park at that time. Complainant testified that she did not go back to sleep that night because she "didn't want to wake up like that again." Complainant also testified that she was in the fifth grade when this incident happened. She also clarified that the first time appellant placed his private part in her mouth occurred before Ryan and appellant moved into the apartment and the second time occurred after Ryan and appellant moved back into the house after living in the apartment.

Kristen Reeder, a child abuse pediatrician at the REACH Clinic at Children's Medical Center, testified that she conducted an examination on complainant. The exam was normal—complainant had no signs of infection or injury—which Reeder testified was expected because the abuse experienced by complainant does not typically cause any injury. Reeder also reviewed the documentation of the SANE

(sexual assault nurse examiner) exam performed on J.B. In the exam, J.B. told the nurse that appellant had touched her with his fingers and pointed to her genitals.

April Kohutek, grandparent of complainant and great-grandparent of J.B., testified that Ryan and appellant's three children lived with her for about a year. J.B. told Kohutek that she remembered her father—appellant—putting his penis in her mouth and that she did not like it when "he peed in her mouth."

Lana Luke, a forensic interviewer at the Hill Country Children's Advocacy Center, testified that she interviewed J.B. and J.B. stated that appellant hurt her private parts. J.B. identified "private parts" as where she went potty and stated that appellant used his fingers on her private parts. J.B. further stated that it happened more than once and when she was sleeping. Luke testified that J.B. was able to give her general and sensory details in the interview.

J.B. testified that appellant hurt her private parts with his fingers more than one time. She also testified that she later told her mother and grandmother what appellant had done. At trial, J.B. testified that she never saw appellant's penis and he never used any other body part to touch her other than his fingers.

The jury found appellant guilty of the offense of continuous sexual assault of a child as charged in the indictment. Appellant elected to have the court assess punishment and, following the punishment hearing, the court sentenced appellant to forty years' imprisonment.

ANALYSIS

A. Lesser-Included Offense

In his first issue, appellant asserts that the trial court erred in denying his request for a charge on the lesser-included offense of aggravated sexual assault of a child. During the charge conference, appellant requested that aggravated sexual assault of a child be included as a lesser offense.

Courts apply the *Aguilar/Rousseau* test to determine whether an instruction on a lesser-included offense should be given to the jury. *See Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). A charge on a lesser-included offense must be given if (1) the lesser-included offense is included within the proof necessary to establish the charged offense, and (2) there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser offense. *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993); TEX. CODE CRIM. PROC. ANN. art. 37.09. The first step is a question of law, and it does not depend on the evidence raised at trial. *Cavazos*, 382 S.W.3d at 382. If this first step is met, then the court moves on to the second step of the *Aguilar/Rousseau* test and considers whether there is some evidence that would permit a rational jury to find that, if the appellant is guilty, he is guilty only of the lesser offense. *Cavazos*, 382 S.W.3d at 383. This second step is a question of fact

and is based on the evidence presented at trial. *Id.* A defendant is entitled to an instruction on a lesser-included offense if some evidence from any source raises a fact issue on whether he is guilty of only the lesser, regardless of whether the evidence is weak, impeached, or contradicted. *Id.*

In this case, aggravated sexual assault of a child is a lesser-included offense of continuous sexual assault of a child. *Price v. State*, 413 S.W.3d 158, 163 (Tex. App.—Beaumont 2013), *aff'd*, 434 S.W.3d 601 (Tex. Crim. App. 2014); TEX. PENAL CODE ANN. 21.02(c)(4), (e)(3). Turning to the second step, we now determine whether a lesser-included offense instruction on aggravated sexual assault was warranted in this case. The Texas Court of Criminal Appeals has noted that there are two ways that evidence may indicate that a defendant is guilty of only the lesser offense: (1) evidence may have been raised that refutes or negates other evidence establishing the greater offense; and (2) the evidence presented regarding the defendant's awareness of the risk may be subject to two different interpretations, in which case the jury should be instructed on both inferences. *Cavazos*, 382 S.W.3d at 385.

Here, appellant argues that the following evidence would permit a jury to find appellant guilty of only the lesser offense: (1) "evidence at trial contains evidence that questions if the named victim knew the timeline of the incidents that she testified about;" (2) "forensic interviewer McConnell acknowledged that [complainant] jumbles the situations because she talks about living in the house, first moving in

third grade and then she goes to stuff that happened in the house whenever she is in the fourth grade and then jumps back to the apartment;" (3) "McConnell said the named victim wasn't 100 percent clear on what grade she was in when [her sister Jamie] still lived in the home." Appellant essentially argues that he is entitled to an instruction of the lesser-included offense because of an alleged jumbling of the timeline regarding the two sexual acts. We note, however, that none of the evidence described above consists of affirmative evidence that both sexual acts occurred within a thirty-day window or that only one occurred. *See Cavazos*, 382 S.W.3d at 385; *Smith v. State*, No. 12-17-00106-CR, 2018 WL 5276721, *4 (Tex. App.—Tyler Oct. 24, 2018, pet. ref'd) (mem. op.) (not designated for publication) ("There must be affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense."). There was no evidence introduced at trial that both sexual acts occurred less than thirty days apart. As for appellant's argument there is evidence that "supports a finding that the second aggravated assault incident did not occur," we address and dismiss this argument in detail below.[1]

Here, the record clearly establishes that two different sexual acts took place in a time period of more than thirty days. *See Smith*, 2018 WL 5276721, at *4 (no abuse of discretion in denying instruction on lesser-included offense because there

[1] *See infra* at Section B(iii).

was no evidence that only a single instance of sexual abuse took place, or that if more than one instance of abuse occurred, that all of them occurred in less than a thirty-day period or after the victim's fourteenth birthday).[2] Because the facts did not raise aggravated sexual assault as a valid alternative to the charged offense, appellant was not entitled to the jury instruction. *Id.* Appellant failed to meet the second prong of the *Aguilar/Rousseau* test because there is no evidence that would permit a jury to find that, if appellant is guilty, he is guilty of only the lesser offense. Accordingly, we overrule appellant's first issue.

B. Sufficiency of Evidence

In his second issue, appellant asserts that the evidence was insufficient to support his conviction for continuous sexual assault of a child. Appellant specifically asserts that the evidence failed to establish two acts of sexual abuse took place and they occurred thirty days or more apart.

(i) Standard of review

When reviewing whether there is legally sufficient evidence to support a criminal conviction, the standard of review we apply is whether, after reviewing 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. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Jackson v. Virginia*,

[2] *See infra* at Section B(ii) and (iii).

443 U.S. 307, 319 (1979)). The evidence may be circumstantial or direct, and we permit juries to draw multiple reasonable inferences from the evidence presented at trial. *Vernon v. State*, 457 S.W.3d 814, 819 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd). The jury is the sole judge of witness credibility and of the weight given to any evidence presented. *Id.* at 819–20. A jury may believe or disbelieve some or all of a witness's testimony. *Id.* at 820. On appeal, reviewing courts determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448.

(ii) Penal code

Pursuant to the penal code, a person commits continuous sexual assault of a child if "

> (1) during a period that is 30 days or more in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense."

See TEX. PENAL CODE § 21.02(b).[3]

[3] We note that appellant does not contest that appellant was more than seventeen years of age, or that the complainant was younger than fourteen years of age. Here, the evidence included testimony that appellant's birth date was March 7, 1997 making appellant nineteen to twenty years old at the time of the incidents. In addition, complainant testified that she was twelve years old at the time of trial making her nine and ten at the time of the incidents at issue. Accordingly, there is no dispute on the requisite ages for the offense of continuous sexual assault.

(iii) Two acts of abuse

Appellant first asserts that there is insufficient evidence that the second sexual act took place because complainant "testified that she didn't remember what it felt like, she didn't remember where in her mouth she felt it, and she didn't remember if she saw it." Essentially, appellant asserts the lack of specificity in complainant's testimony undermined the verdict such that no reasonable juror could have found that the second act occurred. We disagree.

Here, complainant testified that she was in the living room watching Guardians of the Galaxy and she fell asleep. When she woke up, complainant testified that appellant was standing in front of her and he had his private part in her mouth. She moved her body in the opposite direction and he went into the kitchen. She further testified that it was early in the morning when it was still dark outside. Complainant could not remember if appellant tried again but her brother's friend Chris came into the house because he needed Wi-Fi. Complainant testified that she did not go back to sleep that night because she "didn't want to wake up like that again." Complainant also testified that she was in the fifth grade when this incident happened. Here, complainant did provide specific details about the incident; they were just different details than the ones appellant noted. The testimony of a child victim alone is sufficient to support a conviction for continuous sexual abuse of a child. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a); *Garner v. State*, 523 S.W.3d 266, 271 (Tex. App.—Dallas 2006, no pet.). To the extent that complainant could

not recall additional details at trial about the second incident, this was a credibility issues that the jury elected to resolve against appellant. The factfinder is the exclusive judge of witness credibility, the determiner of the weight accorded to each witness's testimony, and the reconciler of conflicts in the evidence. *See Lee v. State*, 186 S.W.3d 649, 655 (Tex. App.—Dallas 2006, pet ref'd). It is not our role to become a thirteenth juror. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Here, the jury found complainant credible and believed her testimony.

Further, in this case, there was also McConnell's testimony. McConnell conducted complainant's interview just a week after the second act occurred and complainant had recalled additional details. Complainant told McConnell that it happened around 3:00 a.m. in the morning and that it "felt the same as it did the last time." In the interview, complainant stated the following about the first time she woke up with appellant's private part in her mouth: (1) she knew it was a private part because she had changed diapers before; (2) complainant knew it was a private part because it was lower on his body; and (3) when McConnell asked clarifying questions about the private part, complainant said it was "white and it felt soft."

Viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found that two acts required for this offense occurred beyond a reasonable doubt. For these reasons, we overrule appellant's this portion of appellant's second issue.

(iv) Thirty days or more apart

Appellant next argues the evidence failed to establish that the requisite two acts of sexual abuse took place thirty days or more apart. Appellant argues that "the named victim was confused about when all of the events occurred that she testified about" and "[b]ecause the named victim was without the ability to know the dates when the acts occurred there is not sufficient evidence to support the jury's finding that the two acts occurred 30 days or more apart." We disagree.

McConnell testified that complainant told her the first act occurred at the beginning of fourth grade when she woke up in her bed and appellant's private part was in her mouth. McConnell also testified that the second act occurred the week before the interview and the interview occurred on September 14, 2017 when complainant had started fifth grade. At trial, complainant testified that she could not remember what grade she was in when the first act occurred but she knew that her sister Jamie had already moved out and she knew Jamie moved out before she began fifth grade. She also testified that it occurred before Ryan and appellant moved into the apartment. In regard to the second act, complainant testified that she was in fifth grade when it happened. Complainant further testified that the first act occurred before Ryan and appellant moved into the apartment and the second act occurred after Ryan and appellant moved back into the house after living in the apartment. Ryan testified that she and appellant lived in the apartment for about a year.

Accordingly, there is sufficient evidence that the two acts took place thirty or more days apart. First, the testimony states that one act occurred when complainant was in the fourth grade and one act occurred when she was in fifth grade. Further, the testimony also establishes the first act and second act occurred approximately a year apart based on complainant's testimony about when Ryan and appellant were living in an apartment. Thus, it was rational that a jury concluded that the two acts took place thirty days or more apart.

In response to appellant's assertion that there was not sufficient evidence because complainant was "without the ability to know the dates when the acts occurred," we note that the State was not required to prove actual dates. *Garner*, 523 S.W.3d at 271 ("Although the exact dates of the abuse need not be proven, the offense does require proof that two or more acts of sexual abuse occurred during a period of thirty days or more."). Accordingly, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found beyond a reasonable doubt that the two acts required of this offense took place thirty days or more apart. For these reasons, we overrule appellant's this portion of appellant's second issue.

CONCLUSION

On the record of this case, we affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHARLES WAYNE BROWN, Appellant	On Appeal from the 219th Judicial District Court, Collin County, Texas Trial Court Cause No. 219-83909-2017.
No. 05-19-00597-CR V.	Opinion delivered by Justice Evans.
THE STATE OF TEXAS, Appellee	Justices Bridges and Pedersen, III participating.

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

Judgment entered July 17, 2020.