Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00237-CV

IN THE MATTER OF A.R.S., A CHILD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1
Fort Bend County, Texas
Trial Court Cause No. 7339

O P I N I O N

This is an appeal from adjudication of a juvenile for delinquent conduct. In the proceedings below, the court found appellant, A.R.S., had engaged in delinquent conduct by engaging in an act amounting to indecency with a child. TEX. PEN. CODE ANN. § 21.11 (Vernon Supp. 2001). Based on this finding, the trial court placed appellant on probation for a period of twenty-four months with the following conditions: twenty-four hour curfew when outside of school, participation in a sex offender program, and registration as a sex offender. From this order of adjudication, appellant now raises five issues for review. We

affirm.

Background

On July 27, 1999, Maria Fonseca returned from work to her daughter and granddaughter, E.F., who had been staying at home without adult supervision. As Fonseca retired to her bedroom to change clothes, she noted the presence of E.F.'s cousin, twelve-year old A.R.S., who lived next door. After reemerging from her bedroom and noticing E.F.'s absence, Fonseca found the child and appellant sitting on a sofa in the home of Fonseca's mother-in-law.[1] Fonseca then instructed both children to leave the premises. Appellant obeyed Fonseca's instructions and returned to her home while four-year old E.F. retreated to a different area of Fonseca's yard in tears. Subsequently, appellant went back to his home and E.F. went into Fonseca's home. Fonseca asked her what the two had been doing in her mother-in-law's home. E.F. replied that appellant had touched her "cosita." Understanding this as a Spanish slang term for the female vagina, Fonseca called the police. Appellant was charged with engaging in sexual contact with a child. TEX. PEN. CODE ANN. § 21.11(a) (Vernon Supp. 2001). We first address appellant's legal and factual sufficiency issues.

Legal and Factual Sufficiency

In his third and fourth issues for review, appellant asserts that the evidence adduced at trial is legally and factually insufficient to support his adjudication. In juvenile cases, a reviewing court employs the criminal legal sufficiency standard of review. *In re G.A.T.* 16 S.W.3d 818, 828 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The evidence is legally sufficient if, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319; *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). In a legal sufficiency review, an appellate court

[1] Apparently, this home was located a few feet behind Fonseca's home.

reviews all the evidence but disregards evidence not supporting the verdict. *See, e.g., Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). Finally, if an appellate court sustains a legal sufficiency challenge, it must render a judgment of acquittal. *Clewis*, 922 S.W.2d at 133.

In contrast to a legal sufficiency, a factual sufficiency review requires the court to view the evidence in a neutral light. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996)). We conduct such a review by examining the evidence weighed by the fact finder that tends to prove the existence of an elemental fact in dispute and compare it with evidence tending to disprove that fact. *Johnson*, 23 S.W.3d at 7. Under a factual sufficiency review, a court will set aside a verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

A person commits the offense of indecency with a child if he engages in sexual contact with a child who is younger than seventeen years and not his spouse. TEX. PEN. CODE ANN. § 21.11(a) (Vernon Supp. 2001). The Penal Code defines "sexual contact" as any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person. *Id*. at § 21.01(1)(B)(2) (Vernon. 1994). The requisite intent to arouse or gratify one's sexual desire can be inferred from conduct, remarks, and an examination of the surrounding circumstances. *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981).

Disregarding all evidence not supporting the court's adjudication of appellant's delinquency, the remaining evidence supports a finding of the essential elements of indecency with a child. First, the record shows that E.F. was four years old and unmarried at the time of trial. In addition, E.F. testified that appellant touched her "coochy" with his finger. E.F.'s grandmother, Maria Fonseca, testified that this was the area where E.F. "goes [to] pee." Finally, E.F. testified that she and A.R.S. were alone in Lupe's living room when he touched her "coochy." Based on an examination of the surrounding circumstances and

disregarding all evidence to the contrary, the latter evidence is sufficient to show that appellant acted to gratify his sexual desire. *See id.* at 215-216 (reasoning that when all of appellant's alleged acts of indecency with a child occurred where the presence of others was unlikely, the evidence showed intent to gratify sexual desire). Therefore, viewing the evidence in a light most favorable to the adjudication, we conclude that the trier of fact could have found, beyond a reasonable doubt, the essential elements of indecency with a child. Accordingly, we overrule appellant's legal sufficiency issue.

We now turn to the merits of appellant's factual sufficiency issue. As stated previously, we conduct such a review by examining the evidence weighed by the fact finder that tends to prove the existence of an elemental fact in dispute and comparing it with the evidence tending to disprove that fact. *Johnson*, 23 S.W.3d at 7. Here, appellant generally discusses the evidence for this issue, but does not specifically argue how the evidence is insufficient under any standard of reviewing factual sufficiency. In a factual sufficiency challenge, a summary of the relevant testimony or other evidence relevant to the specific element being challenged should be contained in the brief with an analysis of the standard stated in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996). *Turner v. State*, 4 S.W.3d 74, 81 (Tex. App.—Waco 1999, no pet.); *see also* TEX. R. APP. P. 38.1(h) (providing that brief must contain clear and concise argument for contentions made, with appropriate citations to authorities and to record). Because appellant's factual sufficiency issue does not meet these requirements, it is inadequately briefed and presents nothing for review. Accordingly, we overrule appellant's factual sufficiency issue.

Outcry Testimony

In appellant's first issue for review, he argues that the trial court erred in overruling his motion in limine by excluding the outcry statement made by complainant because the method of obtaining the statement did not comport with section 54.031 of the Family Code. Specifically, appellant asserts that the outcry testimony was unreliable due to coercion; therefore, not admissible under section 54.031.

Generally, an out of court statement made and offered in court for the truth of the matter contained in the statement is inadmissible hearsay. TEX. R. EVID. 801. However, the family code contains an exception for statements made by a child victim of sexual assault. *See* TEX. FAM. CODE ANN. § 54.031 (Vernon 1996). Several requirements must be met before such a statement becomes admissible over a hearsay objection. Relevant to the present case is the required juvenile court finding, in a hearing conducted outside the presence of the jury, that the statement is reliable based on timing, content, and circumstances. *Id*. § 54.031(c)(2). Family Code section 54.031 is the civil analog of the Code of Criminal Procedure's article 38.072 in that both govern the admissibility of hearsay statements by child abuse victims. *Compare* TEX. CODE CRIM. PROC. ANN. Art. 38.072 (Vernon Supp. 2000), *with* TEX. FAM. CODE ANN. § 54.031 (Vernon 1996). Under article 38.072, a trial court's ruling on whether to admit such an "outcry" statement will not be disturbed absent an abuse of discretion. *Hayden v. State*, 928 S.W.2d 229, 231 (Tex. App.—Houston [14th Dist.] 1996, writ ref'd). A trial court abuses its discretion when its ruling on the admissibility of evidence falls outside the zone within which reasonable persons might disagree. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). Accordingly, we will apply an abuse of discretion standard when the trial court's admits outcry testimony under Family Code section 54.031.

In the present case, the court conducted a hearing on January 21, 2000, to determine the reliability of complainant's outcry statement. At this hearing, Maria Fonseca testified that she arrived home from work on July 27, 1999. Upon arrival, she saw E.F. and appellant in her house. Fonseca proceeded to change her clothes and subsequently noticed both E.F. and appellant were no longer in sight. After finding them on a sofa in her mother-in-law's home, Fonseca instructed them both to leave. According to Fonseca, E.F. responded by running from her presence and crying. Later, Fonseca spoke to appellant, saying "if you tell me what went on, what [you were] doing, I'm not going to tell anybody anything at all," to which E.F. replied that appellant touched her "cosita." Before Fonseca's testimony, E.F. testified that her reason for crying was "because I thought

[Fonseca] was going to get mad at me because . . . [appellant] touched me." E.F. also testified that her outcry statement was given in answer to Fonseca's question asking "what were we doing [on the sofa]."

Other witnesses at the hearing offered contradictory testimony regarding the impetus behind E.F.'s outcry statement. First, Maria Salinas, mother of A.R.S., testified that on the day in question Fonseca told her "I already got it out of [E.F.], you know, what they were doing," and "I asked [E.F.] . . . if [A.R.S.] touched your little thing," and that E.F. told her "yes." Salinas testified that these statements strongly implied that Fonseca forced E.F. to make the outcry statement. In addition, Salinas testified that A.R.S told her he witnessed Fonseca spanking E.F. prior to her running from the house. Finally, Diana Zamora, sister of A.R.S., testified that Fonseca told her "Yo se lo saque," a Spanish phrase meaning "I took it out of her."

As indicated in the record, the testimony offered by E.F. and Fonseca regarding the coercion issue conflicts with statements by Salinas and Zamora. However, the trial court is the exclusive judge of the credibility of the witnesses, may believe or disbelieve any witness, and may resolve any inconsistencies or contradictions in the testimony. *In re J.M.*, 25 S.W.3d 364, 367 (Tex. App.—Fort Worth 2000, no pet.). Therefore, we conclude the trial court's finding of reliability as to E.F.'s outcry statement falls within the zone which reasonable persons may disagree and that no abuse of discretion occurred. Accordingly, we overrule appellant's first issue for review.

Witness Competency

In his second issue for review, appellant argues that the trial court erred in permitting E.F. to testify because she was not competent to testify and an oath was not administered. As a general rule, a child is competent to testify unless, after examination by the court, he does not appear to possess sufficient intellect to relate transactions with respect to which he is interrogated. TEX. R. EVID. 601(a)(2). Competency is not determined by the existence of inconsistencies and conflicts in the child's testimony;

rather, they are simply factors affecting the weight of the child's credibility. *See Woods v. State*, 14 S.W.3d 445, 450 (Tex.App.—Fort Worth 2000, no pet.). Finally, a court's determination as to competency will not be disturbed on review unless an abuse of discretion is shown. *Broussard v. State*, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995). An abuse of discretion occurs where a trial judge acts arbitrarily and unreasonably, without reference to guiding rules or principles of law. *Woods*, 14 S.W.3d at 450.

Applying these standards to appellant's case, we cannot conclude the trial court abused its discretion when it ruled E.F. competent to testify. While her responses to cross-examination showed some conflict and confusion, the remainder of her testimony indicated sufficient maturity and accuracy in her recollection. She was able to recall her street name, the name of appellant, and the names of her three grandmothers, one of which she lived with. E.F. also responded accurately to questions about body parts, clothing, colors, and described where the event occurred. *See Long v. State*, 770 S.W.2d 27, 29 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 800 S.W.2d 545 (holding that court's finding of competency under same circumstances did not constitute abuse of discretion).

Moreover, E.F.'s testimony also demonstrated that, while she could not define the terms "truth" or "lie," she possessed an understanding of the word as demonstrated by the following exchange between appellant's counsel and her:

Counsel:	What does tell the truth mean? What does that mean, to tell the truth? Do you know what that means?
E.F.:	No.
Counsel:	Do you know what it means to lie? Do you know what that means - - word means, 'lie', if you tell a lie?
E.F.:	You'll get time out.
Counsel:	You'll get time out. Okay. Were you scared that if you didn't tell [Fonseca] something that she would give you a time out?
E.F.:	Yes.

Moments later, the prosecutor asked E.F. what Fonseca instructed her to say when asked

about the event that occurred between E.F. and appellant, to which E.F. replied "[Fonseca] told me to say the truth." The prosecutor responded by asking E.F. whether she told Fonseca the truth, to which she responded "yes."

Based on our review of E.F.'s testimony, we cannot say the trial court erred by ruling she was competent to testify. Inconsistent testimony does not militate a conclusion of incompetency; however, E.F.'s credibility may be weighed in consideration of inconsistencies. *Woods*, 14 S.W.3d at 450. Accordingly, the trial court's competency finding was not arbitrary or unreasonable. We find no abuse of discretion.

As a subpoint to his second issue for review, appellant argues that the trial court erred in allowing E.F. to testify because she did not take an oath. However, a child need not take an oath to testify. *Fultz v. State*, 940 S.W.2d 758, 761 (Tex. App.—Texarkana 1997, writ ref'd); *Hollinger v. State*, 911 S.W.2d 35, 39 (Tex. App.—Tyler 1995, writ. ref'd); *Romines v. State*, 717 S.W.2d 745, 748 (Tex. App.—Fort Worth 1986, writ. ref'd). Instead, the trial court must ensure that the child is impressed with the importance of telling the truth. *Hollinger*, 911 S.W.2d at 39; *Dufrene v. State*, 853 S.W.2d 86, 88 (Tex. App.—Houston [14th Dist.] 1993, writ ref'd). Based on E.F.'s testimony that she would get "time out" in the event she told a lie, we find the court had adequate assurance that E.F. understood the importance of telling the truth. Appellant's second issue for review is overruled.

Disqualification of Expert Witness

In appellant's fifth issue for review, he complains the trial court denied his rights under Article I Section 10 of the Texas Constitution and the Sixth Amendment of the U.S. Constitution to present witnesses on his behalf. Specifically, appellant argues that the court erred when it disqualified his mental health expert from testifying in response to his trial counsel's violation of a court order. We find, however, that appellant failed to preserve this issue for appeal.

In the case at bar, appellant's trial counsel called Dr. Karen Gollihar-Sinclair to the stand and began inquiring into her background in an attempt to qualify her as an expert in the treatment of sex offenders. After obtaining the trial court's permission, the prosecutor initiated a voir dire examination of Sinclair. He elicited testimony that appellant's counsel gave Sinclair copies of statements and transcripts in preparation for her testimony. The court learned that appellant's counsel had done this in violation of a previous order sealing evidence. The trial court cited appellant's counsel for contempt and disqualified Sinclair from testifying. Without objecting, appellant's counsel then called her next witness. Accordingly, counsel's failure to object and obtain a ruling thereon resulted in waiver of error. *See* TEX. R. APP. P. 33.1. Therefore, we overrule appellant's fifth issue for review and affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).